- 85-1309

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No. 85-_____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THEODORE KOEHLER,

Petitioner,

v

JOHNNIE LEE McGHAR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I.

WHETHER AN INSTRUCTION WHICH MAY BE DEEMED UNCONSTITUTIONAL UNDER SANDSTROM V MONTANA, 442 US 510 (1979) BUT IS GIVEN ONLY WITH RESPECT TO ONE COUNT OF A TWO COUNT INFORMATION SHOULD BE HELD HARMLESS BEYOND A REASONABLE DOUBT AS TO THE COUNT AS TO WHICH IT WAS NOT GIVEN, WHERE THE TRIAL COURT TOLD THE JURY TO CONSIDER EACH COUNT SEPARATELY AND GAVE A SEPARATE SET OF INSTRUCTIONS AS TO EACH CHARGE AND WHERE THE UNAFFECTED COUNT CONTAINED NO IMPROPER OR UNCONSTITUTIONAL BURDEN SHIFTING INSTRUCTION.

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OPINIONS BELOW

Respondent Johnnie Lee McGhar was charged in a two-count information in the Washtenaw County Michigan Circuit Court with Count I, Assault With Intent to Murder (MCL 750.83; MSA 28.278) and, Count II, Mayhem (MCL 750.397; MSA 38.629) as a result of an incident which occurred on May 13, 1974 in the City of Ann Arbor, Michigan. Respondent was jury tried and convicted as charged on April 22, 1975. He was sentenced to non-mandatory life imprisonment on the charge of Assault With Intent to Commit Murder, and 6 years, 6 months to 10 years on the charge of Mayhem.

The Michigan Court of Appeals affirmed in an unpublished *per curiam* opinion (*People* v *McGhar*, No. 25003, decided January 18, 1977). The Michigan Supreme Court denied

Respondent McGhar's application for leave to appeal by order dated September 1, 1977 (No. 59737).

Respondent then, *in propria persona*, sought delayed leave to appeal of his conviction for assault with intent to murder; the application was denied by the Michigan Court of Appeals in an unpublished Order, *People* v *McGhar*, No. 50891 dated October 22, 1980. The Michigan Supreme Court denied leave to appeal. *People* v *McGhar*, 411 Mich 989 (1981).

Respondent then filed an application for writ of habeas corpus in the United States District Court for the Eastern District of Michigan, Southern Division which was denied in a Memorandum Opinion and Order dated May 10, 1982, by the Honorable Philip Pratt, United States District Judge. *McGhar* v *Koehler*, USDC-ES No. 81-72659, May 10, 1982. The Sixth Circuit Court of Appeals thereafter reversed and remanded the cause for consideration of the merits. *McGhar* v *Koehler*, No. 82-16128, unpublished opinion of March 5, 1984.

The United States District Court for the Eastern District of Michigan issued a Memorandum Opinion and Order (Memorandum Opinion II), granting Respondent McGhar's Motion for Partial Summary Judgment, and conditionally granted a writ of habeas corpus, *McGhar* v *Koehler II*, No. 81-73659, decided September 11, 1984. The Sixth Circuit Court of Appeals affirmed the decision of the District Court in an unpublished *per curiam* opinion, *McGhar* v *Koehler*, No. 85-1177 filed November 8, 1985. The Sixth Circuit stayed its mandate on December 4, 1985.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit which the state seeks to have reviewed was entered November 8, 1985. This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

MCLA 750.83; MSA 28.178 provides:

> "Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, . . ."

MCLA 750.397; MSA 28.629 provides:

> "Any person who, with malicious intent to maim or disfigure, shall put out or maim the tongue, put out or destroy an eye, cut or tear off an ear, cut or slit or mutilate the nose or lip, or cut off or disable a limb, organ or member, of any other person, and every person privy to such intent, who shall be present, aiding in the commission of such offense, shall be guilty of a felony, . . ."

US Const, Am XIV, provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On May 12, 1974, Robert Bennett went to an Ann Arbor, Michigan bar called the Flame (T-48; App 28a).[1] He recognized a friend, Larry Katz, who was seated with McGhar ("Tripper," T-49; App 29a) and joined them (T-48). The three men remained in the bar until approximately 1:30 a.m. (T-459; App 28a), when they decided to leave. Respondent asked if a friend of his could join them. No one objected and the foursome left the bar. They purchased a pizza and two six packs of beer, and proceeded to the apartment where Bennett resided. At some point, while the four were at the apartment, McGhar's friend was ejected from the apartment (T-50; App 29a, 30a) because it was suspected he had stolen some items from a bedroom. Three persons remained. After McGhar's friend left, McGhar became more aggressive (T-64; App 37a).

At approximately 4:30 a.m., or 5:00 a.m., the three left the apartment. Mr. McGhar, driving Bennett's car (T-50; App 30a), drove Mr. Katz home. McGhar then drove the car back to the apartment. McGhar, whom Bennett first met that evening, needed a place to stay that night and Bennett agreed to let him stay at the apartment (T-51; App 30a).

The testimony of the victim, Robert Bennett, at the preliminary examination and at trial established that on the night in question both he and McGhar had been drinking (T-55, 59; App 32a, 33a, 34a). Mr. Bennett also testified, however, that he did not think that at the time of the assault McGhar was intoxicated. Further, just a short time before the commission of the

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[1] The "T" stands for the transcript of proceedings held in *People* v *Johnnie Lee McGhar*, Washtenaw County Circuit Court No. 74-8639 dated April 21 and 22, 1975, and the number pertains to the page number contained within the transcript.

crime, McGhar drove the victim's car and did not appear to have any trouble driving the car or following street directions given to him.

The testimony further established that shortly after return to the apartment as the victim was preparing for bed (T-67; App 38a) there had been conversation regarding "money" between McGhar and the victim, Bennett. This occurred immediately before the assault began. On cross-examination, Bennett explained that after returning from taking the other home, he went into the bedroom where McGhar was located (T-67; App 37a). Bennett testified that after he put blankets on the bed, McGhar asked him for money. Bennett responded "what money?" (T-67; App 38a). The victim and McGhar had previously talked about what McGhar was doing at the Flame Bar, and Mr. McGhar had told him about "earning some money". The victim then testified that he had overheard some discussion about prostitution (T-67, 69; App 38a).

While still in the bedroom after the conversation about money, McGhar began his savage assault upon Bennett.

> "There was no more liquor in the liquor cabinet, we hadn't there wasn't really anything anyway, there was just some empty bottles, you know, and then we talked a little bit more, I think I put on a record, was really hoping by that time he would take off and leave and thinking that he was headed for New York City or the east and when it appeared he wasn't going to leave, I said, well, I am just going to have to go to bed, I was accustomed to staying in the daybed in this apartment after I sold my house and I threw some covers down on the bed and said, here is the daybed, where would you like to sleep, and then Mr. McGhar came around from the back, hit me in the face, he had been carrying a sword during the evening, * * * and he still had it in his hand

> and we were standing in the bedroom and he reached around and the sword in his hand hit me in the face breaking some of my teeth and shoving me on the bed and then, well, from there on we had an hour's worth of hacking away with the sword."

The victim, Mr. Bennett, described to the jury his unsuccessful efforts to escape the rage of McGhar, how McGhar tackled him in the hallway outside the apartment, how McGhar kept the Samari sword, with which the assault was perpetuated, at his throat, how McGhar hit Mr. Bennett in the head, stabbed him in the groin, and chased him down to prevent Mr. Bennett's escape (T-51-53; App 30a-32a).

Finally, the victim described how McGhar took clothing from the closet, keys and dashed out of the apartment (T-63-64, App 35a-36a).

The victim suffered multiple large cuts over his upper extremities and the shoulder. His left arm was for all practical purposes severed; some of his fingers were severely lacerated, and he had sustained a skull fracture. Mr. Bennett was left to the virtual loss of use of the arm (T-109-113; App 39a-43a). He had no pulse. The emergency treatment which the victim received saved his life (T-111, 118; App 42a, 44a).

In his opening statement at trial, counsel for McGhar stated his theory of defense as was "the evidence will show that the incident which lead [sic] to these injuries came after a night of drinking out and of a dose of halluciginic [sic] drugs." (T-46; App 27a). Thereafter counsel indicated that McGhar was not blameless in the incident and that he should not be held unaccountable in the incident (T-46; App 26a). Further, in the course of closing argument, where the defense argued alternatively the only intent McGhar could have had was the intent to commit the lesser offense of assault with

intent to do great bodily harm less than murder, apparently, because Mr. Bennett did not in fact die (T-128; App 46a). Thus McGhar, in effect, conceded some degree of intent before the jury.

The court instructed the jury to consider each count *separately* (T-132; App 47a). After reading the assault with intent to murder statute, the court instructed (T-133-136; App 47a-51a):

> "Now the defendant in this count is charged with the offense commonly termed assault with intent to kill and murder. Any person who shall assault another with intent to commit the crime of murder is guilty of this crime.
>
> The defendant pleads not guilty to this charge.
>
> *To establish this charge the People must prove each of the following elements beyond a reasonable doubt.* First that the defendant assaulted Robert Bennett.
>
> ° ° °
>
> Second, that at the time of committing such assault the defendant intended to murder the complainant, Robert Bennett.
>
> Murder is the killing of one person by another with malice.
>
> Malice is a term with special meaning in the law. Malice means that the defendant intended to kill, or that he consciously created a very high degree of risk of death with knowledge of the probable consequences of his act and that he did so under circumstances which did not justify, excuse or mitigate the crime.

The crime of assault with intent to murder cannot occur if the assault takes place under circumstances which, had death ensued, would have been reduced to the charge of manslaughter,—strike that—would have reduced the charge to manslaughter.

° ° °

"*When a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist.*"

"Intent is a decision of the mind to knowingly do an act with a fully formed objective of accomplishing a specific result. *There can be No crime of assault with intent to murder under our law where there is no intent to murder, and the burden rests upon the Prosecution to show a reasonable doubt—correction—to show beyond a reasonable doubt that the defendant at the time of doing the alleged act had that wrongful intent.*"

"The intent with which a person does an act is known by the way in which he expresses it to others or indicates it by his conduct. The intent with which a person does an act can sometimes be determined from the manner in which it is done. The method used and all other facts and circumstances, but only if established by the evidence."

"If you find that the defendant for any reason whatever, did not consciously and knowingly act with the intent to murder, the crime cannot have been committed, and you must find the defendant not guilty of the crime of assault with intent to murder."

"If, from all of the evidence, you have a reasonable doubt as to whether or not the defendant knowingly and

consciously acted with the intent to murder, then you must find the defendant not guilty of the crime of assault." (Emphasis Added)

The court concluded its instructions on the assault with intent to murder charge by instructing on the lesser included offense of assault with intent to do great bodily harm less than murder, and indicating the possible verdicts which the jury could return on that count (T-137; App 51a).

The court then embarked on separate instructions on the Mayhem charge:

"*Turning now to count two* of the information in this case, I will read you first the statute under which that count is brought, Michigan Statutes Annotated Section 28.629, being Michigan Compiled Laws Annotated 750.397: 'any person who with malice,—correction—any person who with malicious intent to maim or disfigure shall cut off—cut out or to maim the tongue, put out or destroy an eye, cut or tear off an ear, cut or slit or mutilate the nose or lip, or cut off or disable a limb, organ or member of any other person shall be guilty of a felony.'"

"The information charges in count two thereof that on the May 13, 1974 at the Township of Pittsfield, in the County of Washtenaw, Johnnie Lee McGhar did commit the crime of mayhem by cutting off the left ear, cutting off the left thumb and disabling the left arm of Robert Willard Francis Bennett, contrary to Section 750.397 of the Compiled Laws of 1970 and against the peace and dignity of the People of the State of Michigan."

"*The elements of this offense are set forth in the statute and information as I have read them to you.*"

"The question of intent is one that is hard to establish directly because grown persons do not always disclose the object they have in view in any acts in which they may indulge and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it, but in connection with all this unless the testimony satisfied you of something else, you are warranted in holding party responsible for the natural, probable and legitimate consequences of his acts."

"The intent may be inferred from the doing of a wrongful, fraudulent or illegal act, but this inference is not necessarily conclusive." (T-137-138; App 51a-52a) (Emphasis Added)

At this point, the trial court gave the following instructions, which McGhar claimed, and the Court of Appeals and the District Court found violated *Sandstrom* v *Montana*, 441 US 510 (1979).

"The law presumes that every man intends the legitimate consequences of his own act. Wrongful acts knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent."

"Motive is that which recites or stimulates action. Motive is never an essential element of a crime. It is only material from the fact that it tends to show the state of mind when the act was committed. It is never necessary to show a bad motive to convict one of a crime and on the other hand, the best of motive will not exempt one from criminal responsibility for an illegal act wilfully committed."

> "The fact that a criminal act is wilfully done with an innocent or laudible motive will not excuse it. When an act is defined by law to be illegal and criminal, everyone is punishable who does the prohibited act without some legal justification or excuse furnished by the action and the circumstances without regard to his real motive and intention." (T-138, 139; App 52a-53a)

After these instructions on mayhem, the court gave the theory of the parties (T-139-140; App 53a-54a), making clear the matters submitted came from the attorneys. Immediately thereafter followed general instructions on the presumption of innocence, burden of proof, reasonable doubt (T-140, 141; App 54a-55a).

The jury thereafter returned verdicts of guilty as charged on each of the two counts.

REASONS FOR GRANTING THE WRIT

I.

AN INSTRUCTION WHICH MAY BE DEEMED UNCONSTITUTIONAL UNDER SANDSTROM V MONTANA, 442 US 510 (1979) BUT IS GIVEN ONLY WITH RESPECT TO ONE COUNT OF A TWO COUNT INFORMATION SHOULD BE HELD HARMLESS BEYOND A REASONABLE DOUBT AS TO THE COUNT AS TO WHICH IT WAS NOT GIVEN, WHERE THE TRIAL COURT TOLD THE JURY TO CONSIDER EACH COUNT SEPARATELY, AND GAVE A SEPARATE SET OF INSTRUCTIONS AS TO EACH COUNT AND WHERE THE UNAFFECTED COUNT CONTAINED NO IMPROPER OR UNCONSTITUTIONAL BURDEN SHIFTING INSTRUCTION.

Respondent challenged the following instruction:

> "The question of intent is one that is hard to establish directly because grown persons do not always disclose the object they have in view of any acts in which they may indulge and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it, but in connection with all this unless the testimony satisfied you of something else, you are warranted in holding a party responsible for the natural, probable and legitimate consequences of his acts."
>
> "The intent may be inferred from the doing of a wrongful, fraudulent or illegal act, but this inference is not necessarily conclusive. The law presumes that every man intends the legitimate consequences of his own act.

> Wrongful acts knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent."
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> "Motive is that which recites or stimulates action. Motive is never an essential element of a crime. It is only material from the fact that it tends to show the state of mind when ths act was committed. It is never necessary to show a bad motive to convict one of a crime and on the other hand, the best of motive will not exempt one from criminal responsibility for an illegal act wilfully committed."
>
> "The fact that a criminal act is wilfully done with an innocent or laudible motive will not excuse it. When an act is defined by law to be an illegal and criminal, everyone is punishable who does the prohibited act without some legal justification or excuse furnished by the action and the circumstances without regard to his real motive and intention." (T-138, 139; App 52a, 53a)

He argued that the instruction violated the rule of *Sandstrom*, *supra*, and the comparable Michigan ruling in *People* v *Wright*, 408 Mich 1 (1980) (see Memorandum Opinion, App 7a-9a).

Petitioner submits that while the objected to language contained in this instruction may on its face violate the proscriptions of *Sandstrom*, *supra*, the simple appearance of the issue is deceptive. *United States* v *Chiantese*, 560 F2d 1244 (CA 2, 1977). In the trial of the instant case the instruction was limited to the charge of Mayhem. Since no offensive instruction was given in the instructions on assault with intent to murder, the alleged *Sandstrom*-type instruction in the Mayhem charge did not remove the issue of intent from the jurv's

consideration in the assault with intent to murder charge, and was, Petitioner submits, harmless beyond a reasonable doubt as to the charge of assault with intent to murder.

A.

THE ALLEGED OFFENSIVE INSTRUCTION WAS GIVEN ONLY WITH RESPECT TO THE CHARGE OF MAYHEM.

Review of the historical facts in this case quite clearly show that the trial court severed its instructions into three district sections, one for each of the two charges and one of general instructions.

First, it is apparent that the jury was told to treat the charges separately. Near the very beginning of the instructions, the court stated (at T-132; App 47a):

> "There are two counts in the information in this case and you are to consider separately and to return separate verdict as to each of those two counts."

Then the trial court then began the instructions on assault with intent to murder by reading the assault with intent to murder statute. The court then defined the elements of assault with intent to murder, including what intent was required to prove this separate charge (T-133-136; App 47a-51a). The instructions on this count further went on to define the applicable lesser included charges (T-136, 137; App 50a-51a), and finally told the jury what possible verdicts existed (T-137; App 51a). It is clear from the instructions themselves that the jury was separately instructed on the totality of that offense.

Distinctly and separately the trial judge then instructed the jury on Mayhem (T-137-139; App 51a). The court made it clear it was moving to a separate set of instructions when it began:

> "*Turning now to count two of the instructions* in this case. . . ." (T-137; App 51a) (Emphasis Added)

The court then defined the charge of Mayhem, giving the instruction of which Respondent complained.

The trial court then specifically instructed the jury on intent (T-138-139; App 52a-53a). In so doing there was no indication that the instruction was applicable generally or to the already completed set of instructions on assault with intent to murder. Indeed, the court had previously specifically instructed the jury in the assault with intent to murder instruction on the specific intent required and how it could be proved.

> "Intent is a decision of the mind to knowingly do an act with a fully formed objective of accomplishing a specific result. There can be no crime of assault with intent to murder under our law where there is no intent to murder, and the burden rests upon the prosecution to show a reasonable doubt—correction—to show beyond a reasonable doubt that the defendant at the time of doing the alleged act had that wrongful intent."

> "The intent with which a person does an act is known by the way in which he expresses it to others or indicates it by his conduct. The intent with which a person does an act can sometimes be determined from the manner in which it is done. The method used and all other facts and circumstances, but only if established by the evidence."

> "If you find that the defendant for any reason whatever, did not consciously and knowingly act with the intent to murder, the crime cannot have been committed and you must find the defendant not guilty of the crime of assault with intent to murder." (T-135-136; App 49a, 50a).

The fact that the instructions on assault with intent to murder including the instruction on intent had been given, coupled with the fact that in the Mayhem instruction the court told the jury about the necessity of proving "intent to maim" leads to the strong conclusion that the instruction at issue here could only be interpreted by the jury as being applicable to the instruction on *Mayhem*.

In *Cupp* v *Naughton*, 414 US 141 (1973), this court indicated that instructions must not be viewed in artificial isolation, but rather must be viewed in the context of the overall charge.

When viewed in the context of the overall charge, especially when viewed in light of both the specific instructions given and the specific charge to consider the offenses separately, a reasonable juror would have followed the court's directive and would not have applied the alleged infirm instructions to the assault with intent to murder count. In *Tennessee* v *Street*, ___ US ___; 85 L Ed 2d 425, 431 (fn 6) (1985), this Court stated that the assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the constitution are at issue. This conclusion does not differ from the majority's conclusion in *Francis* v *Franklin*, ___ US ___; 105 S Ct ___; 85 L Ed 2d 344, 359-360 (fn 9) (1985), where this Court, per Brennan, J., stated:

". . . we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."

B.

ASSUMING THAT THE INSTRUCTION AT ISSUE WAS ERROR, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

This Court has not resolved whether an erroneous charge that shifts the burden of persuasion to the defendant on an essential element of the offense can ever be harmless. *Francis* v *Franklin*, ____ US ____; 105 S Ct ____; 85 L Ed 2d 344 (1985); *Connecticut* v *Johnson*, 460 US 73 (1983).

Petitioner submits that the harmless error test of *Chapman* v *California*, 386 US 18 (1967) is appropriate to apply to this case and to rule that instructional error in this trial was harmless beyond a reasonable doubt. In advancing this argument, Petitioner notes the following factors:

1. The nature of McGhar's defense at trial was to request the jury to return a compromise verdict; in effect trial counsel conceded that McGhar was not so intoxicated as to be incapable of forming the requisite intent and that some intent existed. This is evidenced by both his opening statement (i.e., "the Defendant does not contend he is blameless") (T-45; App 26a), and by the statement on closing argument (i.e., "if the evidence convinces you that John McGhar had any intent [it] was . . . to cause great bodily harm.") (T-128; App 46a).

2. It must be presumed that jurors, conscious of the gravity of their task, attended closely the particular language of trial court's instruction in this criminal case and strove to under-

stand, make sense and follow the instructions given to them. *Francis v Franklin, supra,* fn 9, at 360; *Tennessee* v *Street,* ___ US ___; 105 S Ct ___; 85 L Ed 2d 425, 431 fn 6; *Marshall* v *Lonberger,* 459 US 422, 438 n 6 (1983); *Parker* v *Randolph,* 442 US 62, 73 (1979) (Renquist, J.). Thus, even if the mere recitation of an instruction violative of *Sandstrom* constitutes constitutional error, the standard for evaluating the effect of the claimed erroneous instruction in a multiple count charge must be different than in a single count charge. Petitioner maintains that the effect of an alleged burden shifting instruction upon a jury in a case involving mutiple counts where the jury is told to consider the charges separately, and the jury is given separate instructions on the elements of each count, should favor compliance with the specific directive of the court and disfavor any speculative analysis that "the jury could easily, and may well have applied the explanatory instructions to both counts," as the District Court found in its second opinion (App 11a fn 2).

3. Numerous factors contained in the instructions in this case distinguish it from *Sandstrom, supra,* and *Francis, supra,* and make it factually and legally more akin to the result achieved by the Connecticut Supreme Court in *State* v *Johnson,* 440 A2d 858 (1981). There the Court reviewed a multiple count conviction of attempted murder, kidnapping in the second degree, robbery in the first degree, and sexual assault in the first degree (see *Connecticut* v *Johnson, supra,* at 74 L Ed 2d at 827). The conviction for kidnapping was affirmed by the state court because the instructions concerning its elements had been couched in the permissive language of inference. *Id.* at 830. Thus the Connecticut Supreme Court applied principles enunciated in both *Sandstrom, supra* and *United States* v *United States Gypsum Co,* 438 US 442, 435, 436, to hold that unless the error was elsewhere cured in the instructions, express conclusive presumptions found in the general instructions would constitute constitutional error re-

quiring a new trial. The Connecticut court then examined the instructions on the specific charges to determine if the *Sandstrom* error was cured. It found that the error of the general instruction was neither used nor incorporated into the instuctions on the kidnapping charge. Hence, no error was determined to have occurred in that charge.

A similar result should occur in this case because the focus of the inquiry should be on the *specific* instructions given on the assault with intent to murder charge, and not on the instruction given on any other charge, or on any general instructions. *Francis* v *Franklin, supra.*

The instant case involves a multiple count indictment which contains a complete set of fully proper instructions on all aspect of assaut with intent to murder including the issue of intent on the charge. Further, the court, most specifically, on multiple occasions, including during the course of the pre-trial instructions, told the jury to consider the counts and the evidence regarding them separately (T-36; App 25a). The court did not give any constitutionally offensive instruction in the charge of Assault with Intent to Murder. The trial court in the general instructions, applicable to the case as a whole, properly instructed the jury on the presumption of innocense (T-140; App 54a), the burden of proof and its application to every essential element of the alleged offense (T-141; App 54a). The court specifically said at that point:

> "The Defendant is not required to prove his innocence . . ." (T-141; App 54a)

Additionally, the presumption of innocence and necessity that proof of the elements of the crime come from the prosecution's evidence was dealt with in detail during jury *voir dire* (T-15-19; App 19a-24a).

This court should conclude that a jury would follow the trial court's specific instruction, would consider the charges and instruction thereon separately, and would not apply instruction given on one count to another count unless instructed to so. Therefore, the jury would not have applied specific erroneous and perhaps unconstitutional instructions to the separate charge that had already been completely, fully and properly instructed upon. Petitioner submits that when the instructions are viewed in their entirety the only possible conclusion is that the *Sandstrom* instruction applied only to the Mayhem count and was thus harmless beyond a reasonable doubt as to the Assault with Intent to Murder count.

RELIEF

WHEREFORE, Petitioner Koehler prays that this court grant a writ of certiorari to the United States Circuit Court for the Sixth Circuit in this matter, conclude that McGhar is not being held in custody in violation of the constitution, laws or treaties of the United States as to the assault charge, reverse the decision of the Sixth Circuit Court of Appeals

and hold the alleged instruction error found herein to be harmless beyond a reasonable doubt as to the charge of Assault with Intent to Murder.

Respectfully submitted,

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APPENDIX

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NOT FOR PUBLICATION

FILED—NOV 8 1985
JOHN P. HEHMAN, Clerk

No. 85-1177

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHNNIE LEE McGHAR,
Petitioner-Appellee,

v.

THEODORE KOEHLER,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Before: ENGEL, KENNEDY, and KRUPANSKY, Circuit Judges.

PER CURIAM. Petitioner McGhar was convicted by a Washtenaw County, Michigan jury in 1975 of two offenses: assault with intent to murder (MCL 750.83; MSA 28.278) and mayhem (MCL 750.397; MSA 28.629). He was sentenced to life imprisonment on the former, and a term of six and one-half to ten years (6 1/2 to 10) on the latter offense.

After exhausing the appeals process, petitioner filed an application for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, Southern Division, challenging the jury instructions at trial and contending that he had been denied his sixth amendment right to effective counsel. The District Court denied the writ. Petitioner appealed to this Court, which reversed and remanded in an unpublished per curiam, *McGhar v. Koehler,* No. 82-1628 (6th Cir. Mar. 5, 1984).

On remand, the District Court granted petitioner's motion for partial summary judgment insofar as it challenged the jury instructions. The District Court then entered an order conditionally granting a writ of habeas corpus and a judgment. On December 21, 1984, the court directed the entry of final judgment in the case.

Petitioner claims, and the District Court held, that the instructions on intent violated the fourteenth amendment under *Sandstrom v. Montana*, 442 U.S. 510 (1979). The state concedes that certain intent instructions did violate *Sandstrom*. However, it raises two issues on appeal: were the offensive instructions limited to the mayhem charge, and if not, was the error harmless beyond a reasonable doubt?

We affirm the District Court's ruling granting petitioner's motion for partial summary judgment in view of the error of constitutional proportions in the jury instructions. We are unable to conclude beyond a reasonable doubt that the jury could not have applied the erroneous intent instructions to both counts. Because both charges arose out of one assaultive act and because defendant's intent was a central issue in each charge, the error was not harmless beyond a reasonable doubt. We find no error in the District Court's analysis.

The judgment of the District Court is affirmed.

FILED—DEC 4 1985
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 85-1177

JOHNNIE LEE MCGHAR,
Petitioner-Appellee
vs.
THEODORE KOEHLER;
FRANK KELLEY,
Respondents-Appellants

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, CLERK John P. Hahman /s/

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHNNIE LEE McGHAR, Plaintiff, vs. THEODORE KOEHLER, and FRANK KELLY, Defendants.	CIVIL ACTION NO. 81-73659

MEMORANDUM OPINION AND ORDER

Plaintiff was convicted of assault with intent to commit murder and assault with intent to commit mayhem on April 25, 1975. His conviction was affirmed by the Michigan Court of Appeals, and leave to appeal was denied by the Michigan Supreme Court.

Proceeding *in propria persona*, plaintiff filed an application for delayed appeal with the Michigan Court of Appeals which was denied. Plaintiff's application for leave to appeal to the Michigan Supreme Court was likewise denied. *People v. McGhar*, 411 Mich. 989 (1981).

Plaintiff then filed a habeas corpus petition with this court challenging his incarceration on three separate grounds.

1. He was denied his sixth amendment right to the effective assistance of counsel by defense counsel's failure to investigate, prepare, and assert intoxication as a defense to the specific intent crimes with which he was charged.

2. He was denied due process by the trial court's jury instructions on the issue of intent.

3. He was denied his sixth amendment right to the effective assistance of counsel by defense counsel's failure to object to the trial court's erroneous burden shifting jury instructions.

In a memorandum opinion of August 10, 1982, this court denied plaintiff's habeas petition. On appeal, the Sixth Circuit Court of Appeals reversed and remanded to this court for reconsideration.[1]

This matter is now before the court on plaintiff's motion for partial summary judgment which is based solely on the jury instruction claim. Before reaching the merits of plaintiff's argument, it is helpful to review briefly the factual background involving plaintiff's claim. On the evening of May 12, 1974, Larry Katz and the plaintiff were in an Ann Arbor bar. A friend of Katz's, Robert Bennet, joined Katz and the plaintiff. Several hours later, about 1:30 A.M., a friend of plaintiff's joined the threesome. All four men left the bar, bought a pizza and some beer, and went to the apartment where Bennet was staying.

While all four men were at Bennet's apartment, the friend of plaintiff's who joined the group just before they left the bar was suspected of stealing something from the apartment, and was "ejected" from the apartment.

After driving Katz home, plaintiff and Bennet returned to Bennet's apartment. Plaintiff apparently needed a place to stay, and Bennet agreed to let him remain in his apartment

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[1]

Details of the Sixth Circuit's ruling will be presented *infra* as it relates to plaintiff's pending claim.

that night. Shortly after returning from taking Katz home, plaintiff and Bennet got into an altercation with plaintiff breaking some of Bennet's teeth. Plaintiff then attacked Bennet with a samurai sword for about 4 minutes, causing extensive injuries.

With this unusual factual background in mind, the plaintiff now challenges the jury instructions as being unconstitutional. It is plaintiff's argument that the "instructions unconstitutionally relieved the prosecution of its burden of proof on the issue of intent." The instructions given were:

> The question of intent is one that is hard to establish directly because grown persons do not always disclose the object they have in view in any acts in which they may indulge and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it, but in connection with all this unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural, probable and legitimate consequences of his acts.
>
> The intent may be inferred from the doing of a wrongful or illegal act, but this inference is not necessarily conclusive. The law presumes that every man intends the legitimate consequences of his own act. Wrongful acts knowingly or intentionally committed, can neither be justified nor excused on the grounds of innocent intent. Motive is that which recites or stimulates action. Motive is never an essential element of a crime. It is only material from the fact that it tends to show the state of mind when the act was committed. It is never necessary to show a bad motive to convict one of a crime and on the other hand, the best of motive will not exempt

> one from criminal responsibility for an illegal act wilfuly [sic] committed.
>
> The fact that a criminal act is wilfully [sic] done with an innocent or laudible motive will not excuse it. When an act is defined by law to be an illegal and criminal [sic], everyone is punishable who does the prohibited act without some legal justification or excuse furnished by the action and the cirsumstances without regard to his real motive and intention.

In challenging these instructions, plaintiff relies on *Sandstrom v. Montana*, 442 U.S. 510 (1979), in which the Supreme Court held unconstitutional a jury charge that stated, "[T]he law presumes that a man intends the ordinary consequences of his voluntary acts." *Id.* at 512, 524. The Court explained:

> We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that the defendant come forward with "some" evidence in rebuttal. However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid.

Id. at 519. Thus, under *Sandstrom*, the prosecution was relieved of its burden of proof on an essential element of the crime charged.

Plaintiff further cites *People v. Wright*, 408 Mich 1 (1980), in which the Michigan Supreme Court held that jury instructions, identical to several of those in the present case, shifted

the burden of proof on the issue of intent. *Id.* at 22, 25. Therefore, plaintiff maintains that the jury instruction was the "functional equivalent of a directed verdict on the issue of intent."

In its memorandum order, this court noted that neither prosecutor nor defense counsel objected to the instructions at issue when they were given to the jury. Memorandum Order at 8. Under Michigan General Court Rule 516, failure to object to a jury charge precludes appellate review of that issue unless it constitutes a miscarriage of justice under M.C.L. 769.26. Further, this court noted that under *Wainwright v. Sykes*, 433 U.S. 72 (1977), habeas review of a constitutional violation would be precluded when a state procedural rule barred such review, absent "cause and prejudice." *Id.* at 90-91. This court noted that the "cause" for not complying with GCR 516 was ineffective assistance of counsel. Memorandum Order at 9. Because *Sandstrom* was decided several years after plaintiff's 1975 trial, this court concluded that "Trial counsel for petitioner [plaintiff] cannot be faulted for not anticipating *Sandstrom* . . ." Memorandum Order at 11.

In addition, this court noted that at least two Michigan decisions held that a jury charge such as the one at issue was approved by the court of appeals. *See People v. Adams*, 48 Mich. App 595 (1973); *People v. Jordan*, 51 Mich.App. 710 (1974). *But see: People v. Wright*, 408 Mich. 1, n. 3 ("Several panels of the Michigan Court of Appeals . . . have grappled with the issues these instructions raise and have reached diametrically opposed results"). This court then concluded that "cause" for counsel's failure to object to the instruction at issue has not been established. Memorandum Order at 14.

Finally, this court noted that the end of the jury charge, *supra*, at 4, stated: ". . . everyone is punishable who does the prohibited act without some legal justification or excuse fur-

nished by the action and circumstances without regard to his real motive and intention." It was acknowledged by this court that the instruction "arguably removed the issue of intent from the jury's consideration," but that it did not result in a violation of due process. Memorandum Opinion at 14-15.

The Sixth Circuit's opinion in this case cited *Wainwright v. Sykes, supra,* as standing for the proposition that plaintiff here is barred from habeas review when he fails to adhere to state procedural rules, such as GCR 516. However, under *County Court of Ulster County v. Allen,* 442 U.S. 140, 147-54 (1979), the rule in *Sykes, supra,* does not apply when a state appellate court reaches the merits of a criminal defendant's constitutional claim, in disregard of its own state's procedural rules. *Id.* Therefore, because the Sixth Circuit interpreted plaintiff's application for delayed appeal as reaching the merits of the claim before the Michigan Court of Appeals, the rule in *Sykes* was held not to apply in the present case. In accordance with the ruling, this court was ordered to consider the merits of plaintiff's sixth amendment claim. Regarding the claim now before this court, the Sixth Circuit opined:

> We also express no views on the district court's ruling regarding McGhar's jury instruction claim. As an exhausted claim, it is also entitled to habeas review. *Engle v. Koehler,* 707 F.2d 241, 244 (6th Cir. 1983), *cert. granted,* (further cites omitted). We do note, however, that the jury instructions challenged here contain the same three constitutional errors found by the Michigan Supreme Court to be a violation of a defendant's right to due process in *People* v. *Wright,* 408 Mich. at 22-26.

With this rather detailed background in mind, the issue becomes whether summary judgment is appropriate on plaintiff's claim that the jury instructions at issue constituted a deprivation of due process. Because it appears that there is

not a genuine issue of material fact existing, summary judgment is appropriate. The instructions themselves, under the *People v. Wright* opinion, *supra*, must be held to be unconstitutional; in addition there appears no disputed issue as to whether the error was a harmless one.

In *Sandstrom*, the only instruction at issue was: "[T]he law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 515. The jury, however, was not told that it had a choice or that such a conclusion might but did not have to be inferred. *Id.* The Court said it was possible that a juror interpreted this as creating "an irrebuttable direction" once the requisite facts are found triggering the presumption. *Id.* at 517. Other instructions were given the jury in *Sandstrom* such as that the accused was presumed innocent and that the State had the burden of proving, beyond a reasonable doubt, that the accused caused the death with purpose or knowledge. *Id.* at 518, n. 7. Even with these other instructions, the Court held the instruction unconstitutional. *Id.* at 521.

In the present case, the jury was instructed that: "The law presumes that every man intends the legitimate consequences of his own act." This is substantially similar to the instruction held unconstitutional in *Sandstrom*.

Additionally, as plaintiff points out, the jury in the present case was instructed: "Unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural, probable and legitimate consequences of his acts." A nearly exact instruction was held unconstitutional in *People v. Wright*, 408 Mich. at 25. The *Wright* court held: "We are convinced that by instructing the jury that 'unless the testimony satisfies you of something else,' the trial court created the prospect that the jury 'may have interpreted the

judge's instruction as . . . a burden-shifting presumption', . . ." *Id.*

Another portion of the charge given in the present case was found unconstitutional under *Wright*. The instant case included a jury charge that provided: "Wrongful acts knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent." The same charge, the *Wright* court held, may be interpreted as shifting the burden of proof from the prosecutor to the defendant—which is unconstitutional. *Id.* at 26.

Under the *Wright* decision, an additional portion of the jury charge in the present case, may also be invalid. In the present case, the jury was instructed that: "Intent may be inferred from the doing of a wrongful, fraudulent or illegal act, but this inference is not necessarily conclusive." Again, the *Wright* court held a similar charge unconstitutional because it suggests that the presumption may, at least sometimes, be conclusive. *Id.* at 20.

Lastly, as this court noted in its memorandum opinion, the following instruction is also suspect: "When an act is defined by law to be an illegal and criminal [sic], everyone is punishable . . . without regard to his real motive and intention."

Defendant argues that the challenged instructions do not pertain to the assault with intent to murder charge but only the mayhem charge. After looking at the entire charge, there is no reference that the burden-shifting instructions were applicable only to one of the charges. Therefore, this portion of defendant's argument is without merit.[2]

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[2]

While it is true that the intent inference is only defined and explained after the assault with intent to commit mayhem charge, since no definition or explanation of intent and its inferential nature was given during the assault with intent to commit murder charge, the jury could easily, and may well have applied the explanatory instructions to both counts.

Defendant cites *Jacks* v. *Duckworth*, 651 F.2d 480 (7th Cir. 1981), as following what is referred to as an "explanatory or qualifying language analysis." In *Jacks*, the Seventh Circuit held that qualifying or explanatory language given with the jury instruction, such as to consider all the surrounding circumstances, negates any mandatory effect the instruction might have on the jury. *Id.* at 485-86.

But, as plaintiff argues, the Sixth Circuit has refused to follow *Jacks*. The Sixth Circuit stated:

> The respondent cites *Jacks v. Duckworth* (citation omitted) which upheld an instruction so long as 'any presumption of a criminal intent from an unlawful act knowingly done was rebuttable by justifying or excusing facts.' As the dissenting judge in that case pointed out, the Seventh Circuit appears to have approved a burden shifting presumption. To the extent that *Jacks v. Duckworth* does so, we decline to follow it.

Engle v. Koehler, 707 F.2d 241, 245, n. 2. Consequently, this aspect of defendant's argument is also without merit.

After considering the relevant cases and jury instructions, those instructions challenged by plaintiff are unacceptable under both *Sandstrom* and *Wright*. In *Sandstrom* the Court held that the test to determine the constitutionality of the instructions was whether a "reasonable juror could have given the presumption conclusive or persuasion-shifting effect . . ." 442 U.S. at 519. *Accord*: *Engle v. Koehler*, 707 F.2d 241, 244 (6th Cir. 1983), *aff'd sub nom*, —— U.S. ——, 80 L.Ed. 2d 1 (1984). Because of the instructions in the present case, the jury may have presumed that because the plaintiff used the samurai sword against Bennet, this constituted proof of intent beyond a reasonable doubt. Therefore, the instructions at issue do not pass muster under *Sandstrom* and *Wright*.

Assuming the jury charge was in error, the next issue to consider is whether such an error was harmless. *Chapman v. California*, 386 U.S. 18 (1967). The *Sandstrom* Court did not reach the question of whether an improper instruction could ever be harmless error beyond a reasonable doubt. Last year in *Connecticut v. Johnson*, 460 U.S. 73 (1983), the Court split on the question left unresolved in *Sandstrom*. A four Justice plurality held that a *Sandstrom* violation could not be harmless error, except in rare instances such as when the defendant admits the issue of intent.

Because the *Johnson* Court failed to provide clear guidance for this court, the rule adopted by the Sixth Circuit must be followed. In *Conway v. Anderson*, 698 F.2d 282 (6th Cir. 1983), *cert. denied*, 103 S.Ct. 3092 (1984), the Sixth Circuit determined that "error predicated upon alleged *Sandstrom* instructions [must be subjected] to the harmless error test as pronounced in *Chapman v. California* (citation omitted)."[3] *See also: Harrington v. California*, 395 U.S. 250 (1969); *Krzeminski* v. *Perini*, 614 F.2d 121 (6th Cir.), *cert denied*, 449 U.S. 866 (1980); *Engle v. Koehler*, 707 F.2d 241 (6th Cir. 1983).

Therefore it must be determined whether the *Sandstrom* error in the present case can be deemed harmless error. The Sixth Circuit in *Conway* phrased the harmless error test under *Sandstrom* as follows: "[A] *Sandstrom* instruction can be deemed harmless only if no rational juror could have concluded from the evidence of record that the perpetrator of

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[3]

Sandstrom has been applied retroactively in the Sixth Circuit because such an "instructional error would normally affect a defendant's right to a fair trial and impact upon the ultimate issue of innocence or guilt." *Conway*, 698 F.2d at 284. *See: Williams v. Engle*, 683 F.2d 152 (6th Cir. 1982); *Krzeminski, supra*; *Burgon v. Bergman*, 649 F.2d 428 (6th Cir. 1981), *vacated and remanded on other grounds*, 456 U.S. 953 (1982).

the crime lacked the requisite intent." 707 F.2d at 284-85. The *Conway* court further held that the prejudicial effect of a *Sandstrom* error is mostly a function of any defense advanced at trial. *Id.* at 285. When a defendant argues that he lacked the requisite degree of culpability or mens rea to commit the act charged, a *Sandstrom*-type error can be "extremely prejudicial." This is true even if "overall proof" or intent or malice is considered substantial. *Id.* On the other hand, if the defendant argues that he did not participate in the alleged crime, such as with an alibi or mistaken identity defense, there is a stronger argument that the *Sandstrom* error is harmless. *Id.*

With these principles in mind, the facts of the present case must now be examined. This case involved a claim that defendant lacked the required level of culpability or intent because of the effects of alcohol and perhaps drugs. Plaintiff argues that in such a case—when "defendant's intent is a contested element at trial"—a *Sandstrom* violation cannot be harmless. In fact, the plaintiff's only defense in the underlying criminal action is that he lacked the required mens rea to commit the substantial crime for which he was convicted.

Plaintiff analogizes his situation to that confronted by the Sixth Circuit in *Engle*, 707 F.2d 241 (6th Cir. 1983). In *Engle* the defendant was convicted of first-degree murder. Defendant, a laid-off auto worker, was an alcoholic. After drinking "heavily" the defendant went to the auto plant where he once worked and began looking for the man he thought was "responsible for his layoff." *Id.* at 242. When he confronted the man, defendant shot him several times, killing him. The defense offered at trial was temporary insanity as a result of alcohol, drugs, and a temporary mental disorder. The jury was instructed about the presumption of innocence and that proof must establish guilt beyond a reasonable doubt.

The district court held the charge—"a rule of thumb that a person is presumed to intend the natural consequences of his acts"—does not establish a conclusive presumption. *Id.* at 244. The Sixth Circuit reversed:

> What the district court did not recognize, however, is that the challenged instructions reasonably could have been interpreted by the jurors as setting forth a presumption which, while not conclusive, shifted to the defendant of proving the absence of malice and intent. As had been indicated, such burden-shifting presumptions are invalid under *Sandstrom*. (Citations omitted).

Id. at 244-45. Therefore, because the error which was involved related to the only defense asserted at trial, the Sixth Circuit held that the burden-shifting instruction could not be considered harmless.

The defendant, contra, takes the position that even if the jury instructions were in error,[4] it was harmless beyond a reasonable doubt. Defendant compares the present case to *Jacks v. Duckworth*, 651 F.2d at 480, which has been accurately distinguished by plaintiff, *supra*. The state also seems to argue that any erroneous instruction was rectified by the general instructions of the presumption of innocence and proof of guilt. This argument was rejected by the Sixth Circuit in *Engle*, 707 F.2d at 245, and likewise must be rejected here. As the Sixth Circuit stated:

> The instructions on the presumption of innocence and on proof beyond a reasonable doubt are not rhetorically

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[4]

As noted *supra*, the defendant makes separate arguments regarding the issue of intent on the assault with intent to murder charge, and then on the mayhem charge. Defendant asserts the harmless error doctrin with only the mayhem charge because of his reading of plaintiff's motion, brief, and the original jury instructions.

> inconsistent with the existence of a burden-shifting presumption because a reasonable juror could have regarded the presumptions on malice and intent as 'a means by which proof beyond a reasonable doubt . . . (omitted in original) could be satisfied.'

Id. at 245.

In addition, the defendant distinguishes *Sandstrom* as follows:

> In essence, the *Sandstrom* court found that since the jurors were not told that they had a choice, nor that they might infer the conclusions; they were only told that the law presumed it. In the case at bar, however, specifically regarding the charge of mayhem, the jury was told that each element had to be proven beyond a reasonable doubt, (TR-141) that each element of the offense had to be proven beyond a reasonable doubt (TR-141) and that they should look to all the circumstances of the case in order to determine whether the element of malice had been proven. (TR-138). In addition, the court specifically indicated that the inference of intent was not necessarily conclusive. (TR-138).

The state's reading of *Sandstrom* is accurate, 442 U.S. at 515, but the analogy drawn is not as strong as suggested. The *Sandstrom* jury was not told that it had a choice or that such a conclusion might be inferred. *Id.* However, the *Sandstrom* jury, as in the present case, was instructed that the accused was presumed innocent and the state had the burden of proving each element of the crime charged beyond a reasonable doubt. Therefore, the only substantive distinction between *Sandstrom* and the present case is that the court here stated that the inference of intent was not conclusive. This was not done in *Sandstrom*. *Id.* Defendant's brief at 16. *Accord: Engle*, 707 F.2d at 244.

Finally, the state relies on *Connecticut v. Johnson*, 460 U.S. 73 (1983), to support its argument that a proper jury charge may have a "substantially curative effect" on an erroneous instruction. Defendant's brief at 21. The state's reliance on this case is clearly misplaced. Because *Johnson* is a four-justice plurality (Blackman, J., Brennan, J., White, J., and Marshall, J.), its precedential value is somewhat uncertain. Nevertheless, the plurality held that an erroneous instruction given the jury created a conclusive presumption allowing the jury to convict the defendant without considering certain evidence of intent. The *Johnson* plurality stated that "such an error deprived respondent of 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Id.* at 88. It is difficult to see how this case supports the state's position.

The harmless error issue presents a close question. There is important language in the cited cases which view the instructions given in the present case as taking the issue of intent out of the jury's hands. On the other hand, there were other instructions given by the court and stressed by counsel that the jury must find the requisite level of culpability before convicting the defendant of the crimes charged. *See* Memorandum Opinion at 15.

The most troubling aspect of this motion is the overwhelming brutality involved in the case. The evidence, quite graphically, shows that plaintiff repeatedly attacked Bennet and inflicted severe injuries. But the fact remains that the jury instructions are nearly indistinguishable from those found unacceptable under both *Sandstrom* and *Wright*. It is difficult, if not impossible, to conclude that the instructions given the jury in the present case did not contribute to plaintiff's convictions, and therefore, are not harmless error.

Therefore, summary judgment should be granted to the extent that plaintiff challenges the jury instructions.

Counsel are directed to submit an order in accordance with the foregoing, including a provision permitting the defendant a reasonable time period for the re-trial of plaintiff.

IT IS SO ORDERED.

Philip Pratt /s/
PHILIP PRATT
United States District Judge

Dated: September 21, 1984
Detroit, Michigan

[15] Have any of you, or any members of your respective families or any of your friends, to your knowledge, ever been involved in a crime such as those alleged to have been committed in the two counts, or either of them, in this case; if so, please raise your hands. No hands raised.

Now under the law a defendant is presumed to be innocent at the start of the trial, through the taking of proofs, the arguments of counsel, and the instructions of the Court, and until such time as the jury, in its deliberations may find, if it does so find, that the Prosecution has overturned the presumption of innocence and has established beyond a reasonable doubt that the defendant committed the offense or offenses covered by the information.

Accordingly, if you were asked to vote at the present time as to whether the defendant is not guilty or is guilty of the—each of the two counts charged in the information, what would your vote be, Mr. Ellison?

JUROR No. 74: Not guilty.

THE COURT: Mrs. Burns?

JUROR No. 39: Not guilty.

THE COURT: Mr. Dunham?

JUROR No. 69: Not guilty.

THE COURT: Mr. Exoo?

JUROR No. 77: Not guilty.

THE COURT: Mr. Babbitt?

[16] JUROR No. 11: Not guilty.

THE COURT: Mr. Abbeduto?

JUROR NO. 1: Not guilty.

THE COURT: Mr. Allen?

JUROR No. 6: Not guilty.

THE COURT: Mrs. Ercoli?

JUROR No. 75: Not guilty.

THE COURT: Mr. DeForge?

JUROR No. 65: Not guilty.

THE COURT: Mrs. Daniels?

JUROR No. 62: Not guilty.

THE COURT: Mr. Brady?

JUROR No. 33: Not guilty.

THE COURT: Mrs. Allen?

JUROR No. 7: Not guilty.

THE COURT: Mr. Etzel?

JUROR No. 76: Not guilty.

THE COURT: And Mrs. Edwards?

JUROR No. 73: Not guilty.

THE COURT: Now if the evidence in support of the theory and claim of the Prosecution was about equal in weight to that in support of the theory and claim of the defense, but not more than equal in weight, what would your vote be as to whether the defendant was guilty or not guilty Mr. Ellison?

JUROR No. 74: Not guilty.

[17] THE COURT: Mrs. Burns?

JUROR No. 39: Not guilty.

THE COURT: Mr. Dunham?

JUROR No. 69: Not guilty.

THE COURT: Mr. Exoo?

JUROR No. 77: Not guilty.

THE COURT: Mr. Babbitt?

JUROR No. 11: Not guilty.

THE COURT: Mr. Abbeduto?

JUROR No. 1: Not guilty.

THE COURT: Mr. Allen?

JUROR No. 6: Not guilty.

THE COURT: Mrs. Ercoli?

JUROR No. 75: Not guilty.

THE COURT: Mr. DeForge?

JUROR No. 65: Not guilty.

THE COURT: Mrs. Daniels?

JUROR No. 62: Not guilty.

THE COURT: Mr. Brady?

JUROR No. 33: Not guilty.

THE COURT: Mrs. Allen?

JUROR No. 7: Not guilty.

THE COURT: Mr. Etzel?

JUROR No. 76: Not guilty.

THE COURT: And Mrs. Edwards?

JUROR No. 73: Not guilty.

[18] THE COURT: Now if you became convinced that the Prosecution had overturned the presumption of innocence and had established beyond a reasonable doubt that the defendant committed the offenses covered by the information, then what would your vote be as to whether the defendant was guilty or not guilty, Mr. Ellison?

JUROR No. 74: Guilty.

THE COURT: Mrs. Burns?

JUROR No. 39: Guilty.

THE COURT: Mr. Dunham?

JUROR No. 69: Guilty.

THE COURT: Mr. Exoo?

JUROR No. 77: Guilty.

THE COURT: Mr. Babbitt? -

JUROR No. 11: Guilty.

THE COURT: Mr. Abbeduto?

JUROR No. 1: Guilty.

THE COURT: Mr. Allen?

JUROR No. 6: Guilty.

THE COURT: Mrs. Ercoli?

JUROR No. 75: Guilty.

THE COURT: Mr. DeForge?

JUROR No. 65: Guilty.

THE COURT: Mrs. Daniels?

JUROR No. 62: Guilty.

[19] THE COURT: Mr. Brady?

JUROR No. 33: Guilty.

THE COURT: Mrs. Allen?

JUROR No. 7: Guilty.

THE COURT: Mr. Etzel?

JUROR No. 76: Guilty.

THE COURT: And Mrs. Edwards?

JUROR No. 73: Guilty.

THE COURT: Do any of you ladies and gentlemen in the jury box know of any reason why you could not render a true, just, fair and impartial verdict on the evidence as submitted and the instructions of the Court as given to you if you are seated as a juror in this case. If you know of any such reason please raise your hands. There are no hands raised.

Do you have any further questions that you'd like to have the Court address to the ladies and gentlemen in the jury box, Mr. Noah?

MR. NOAH: No, thank you, Your Honor.

THE COURT: Mr. Shaner?

MR. SHANER: No, not at this time, thank you, Your Honor.

THE COURT: Very well. Challenges for cause, Mr. Noah?

MR. NOAH: None, Your Honor.

THE COURT: Challenges for cause, Mr. Shaner?

[36] (Jurors were sworn at 10:35.)

THE COURT: Please be seated, ladies and gentlemen. The remaining members of the panel, we thank you for coming into courtroom number two today. If you will go back to the jury assembly room they will have further instructions for you shortly. Thank you for coming into Courtroom two.

Addressing myself to the ladies and gentlemen in the jury box, I would like to make a few introductory comments. First of all, there are two counts against the defendant in this case and consequently you will be asked to render your verdict separately on each of those two counts. You should consider the evidence separately as it relates to each count.

Further, in order to avoid the possibility of introducing any error into this trial which might necessitate re-trying the case, we will ask you to observe certain routine precautions.

You are asked to report promptly in the mornings and during recesses and adjournments. You are asked to go—I am sorry—strike that. When you report in the morning and during recesses, you are asked to go directly to the jury deliberation room for this Court, and you should avoid the offices, restrooms, restaurant and any unnecessary travel through the corridors of the Courthouse, and above

[45] MR. SHANER: Thank you, Your Honor.

Ladies and gentlemen of the Jury: The defendant is before you as the Prosecutor and the Judge have indicated, charged with two crimes, first of these crimes is assault with intent to commit murder or, as the Judge told you, that's what it is commonly known as. The second is commonly known as the crime of mayhem.

The crux of the crime of mayhem is the disfiguration and disabling of the complainant.

The evidence will show you, as the Prosecutor has indicated, that during the early morning hours of May 13, 1974, the defendant, John McGhar did cause certain injuries, grievous injuries to the complainant Robert Bennett. The injuries were caused by the use of a Japanese Sword.

The evidence will show that as a result the complainant, Mr. Bennett, has been disfigured, has been disabled. Regardless of the fact that the evidence will show these things, does not diminish the fact that the defendant is not guilty of the crime of assault with intent to commit murder. The defendant does not contend that he is blameless in this incident, the defendant does not contend that he should be held unaccountable for the grievous injuries that were done Mr. Bennett. That does not diminish the fact that the defendant is not guilty of the charge of assault with intent to commit murder. The crux of this crime is the intent. It is that element which will be [46] the central focus, I submit to you, of this case. The evidence will not include any verbalized statement that will give you the solid evidence of what may or may not have been in the defendant's mind in the early morning hours of May the 13th.

This will leave you in a difficult position of attempting to delve into the mind of John McGhar at that time. You will have to examine all of the facts and circumstances surrounding the events of that early morning, and in particular the things that John McGhar did and the things that Robert Bennett did.

It's the defendant's position that if you are able to listen carefully to all of the evidence and not simply reject it, as perhaps too discomforting to listen to, if you will listen to it as calmly as possible and with an unprejudiced and open mind that the evidence will fail to support the charge against the defendant of assault with intent to commit murder beyond a reasonable doubt. The evidence will show that the incident which lead to these injuries came after a night of drinking on top of a dose of halluciginic drugs. The evidence will also show, as grim as it may sound, had the defendant wanted to kill Robert Bennett, he had ample opportunity to do so.

The evidence will show a very bizarre event, but the evidence will not show that the defendant, John

[48] DIRECT EXAMINATION BY

MR. NOAH:

Q Mr. Bennett, would you relate to the jury your full name?

A Robert Bennett.

Q Would you spell your last name, please?

A B-e-n-n-e-t-t.

Q Mr. Bennett, would you tell the jury in your own words a sequence of events starting on May 12, 1974 when you first went to the Flame Bar in Ann Arbor?

A Well, I just left with another friend and with—we were just going to stop in for a quick drink, he had to student teach the next day and I was—I didn't have to go to work, and so I decided to stay, saw another acquaintance, sat down at a table which Mr. McGhar was at and we sat there drinking, I think for an hour, maybe a hour and a half and it was suggested that we go out and get something to eat and I thought we were going to a local restaurant and on the way out Mr. McGhar said he had a friend he would like to bring along and from there we went, well, it was suggested that we just order a pizza and I was taking care of a friend's apartment, I just sold my house and he was in California, and I just returned from California and we stopped on the way, I bought some beer, and went back to the apartment, had the pizza, we were watching television—

Q Let me interrupt you, what time did you go to the Flame Bar, if you recall?

[49] A I'd say roughly around 11 or 11:30.

Q That would be on the 12th?

A Right.

Q Now what time did you leave the Flame Bar?

A Probably 1, I guess, 1:30.

Q All right, now you mentioned that Mr. McGhar was at that table, is Mr. McGhar in Court today?

A Yes.

Q Can you point to him?

A Yes, he is sitting there.

Q Let the record reflect as the witness answered the last question he pointed to the defendant, John McGhar. Did you know him by John McGhar that night?

A No, I just knew him by his nickname Tripper which was mentioned before.

Q All right, now after you got the pizza and the beer and you went to this apartment, where is this apartment located?

A In—I blanked on the name, Woodland Hills.

Q Now this was Randall Smith's apartment?

A Right.

Q All right, who else was with you besides Mr. McGhar at this time?

A Larry Katz and another person that was a friend of Mr. McGhar's. I don't remember his name.

Q All right, now would you continue to relate to the jury in [50] your own words what happened after you got back and were eating the pizza and drinking the beer?

A Well, it just got to be very late and Mr. McGhar's friend had been using the phone and he walked into—I don't know if I asked him to or if he offered to, but he walked in to check on him and said he had taken something from the apartment and was not just using the phone, was setting it up for a theft, there were various things in the apartment that could have been stolen and so naturally I wanted to get out of the apartment pretty fast, it seemed like it took us a while to get moving, but we got out of the apartment, Mr. McGhar

got his friend out very peaceably and I appreciated that at the time and we then got into my car and I left Mr. McGhar drive the car, we dropped off this other person on Mary Court and then rounded the corner and it was Mr. Katz wanted to come back to the apartment and I just—it was too late by then, it must have been somewhere closely approaching five o'clock in the morning, I would say, and I asked Mr. McGhar, I was under the impression earlier that Mr. McGhar was just stopping through town and had been here for the day, was from California and was on his way out of town and there had been talk of him staying there earlier, but then during the evening went on I found out he had been staying in town and then I asked him at the corner of State Street where he would like to be let off and where he was going to stay and he said he was leaving town and [51] asked if he could come back to the apartment which he did, and after we got back to the apartment, it was getting towards daylight, we had a probably a 45 minute conversation, Mr. McGhar wanted more to eat and drink, I remember him messing up the kitchen slightly, he started to act what I thought in a sort of aggressive, bizzare way, fooling around in the kitchen and he was making something and tried to put some of it in my face and also I was just worried about the apartment was not mine, as I mentioned, I was worried about the condition of things. There was no more liquor in the liquor cabinet, we hadn't, there wasn't really anything anyway, there was just some empty bottles, you know, and then we talked a little bit more, I think I put on a record, was really hoping by that time he would take off and leave and thinking that he was headed for New York City or the east and when it appeared he wasn't going to leave, I said, well, I am just going to have to go to bed, I was accustomed to staying in the day bed in this apartment after I sold my house and I threw some covers down on the bed and said, here is the daybed, where would you like to sleep, and then Mr. McGhar came around from the back, hit me in the face, he had been carrying a sword dur-

ing the evening, I asked him to put it down once when he was sort of flailing away at Mr. Katz's feet, it was a joke, but it was a sharp sword and I was worried about not only Mr. [52] Katz's feet, but the apartment in general, and it was a decoration on the wall and he still had it in his hand and we were standing in the bedroom and he reached around and the sword in his hand hit me in the face breaking some of by teeth and shoving me on the bed and then, well, from there on we had an hour's worth of hacking away with the sword.

Q Well, would you tell the jury whether or not you ever tried to get out of there?

A Oh, I tried several times, yes.

Q And what happened?

A Well, usually, I heard, one time I remember being sort of tackled in the hallway, small hallway and—and Mr. McGhar kept the sword at my throat for a while was on top of me, I climbed under the dining room table at one point to get away from him. I had already been hit a few times in the head and stabbed in the groin when I was on the bed and I at that point I pushed him away and made a dash for the door, but didn't make it.

Q Why didn't you make it?

A Well, Mr. McGhar stopped me as I said, grabbed me in the hall and threw me down to the ground, hit me with the sword a couple of more times, I got under the table, was under there for a while, he poked at me a few times, wanted me to get out, at this point was interested in some money, I guess I had already handed him what I had in my pocket, which I guess was a couple of dollars and a few cents, and I made another dash, [53] I made a couple of dashes for the door, that's one reason why I was, this shoulder was so

severely injured was because every time I tried and reached for the lock Mr. McGhar would go at my back with the—with the sword, also he poked a couple of times, wanted me to get away from my suitcase, wanted me to look in it first and I had a broken arm by that time and—and I couldn't look through it so he made me move away and he was trying to search for some money or my wallet, I guess, that was what it was, I don't guess.

Q All right, now you mentioned your right shoulder was severely injured, what about your left arm?

A Well, I lost the use of my thumb was off, but the tendone were cut and the nerves are cut and I lost the use of my left hand.

Q How did you receive this injury?

A During part—part of the attacks I was trying to grab, sir, I had numerous cuts on my other hand too, just occasionally putting it up in the air and grabbing the sword, I got two concussions out of it trying to and a couple of other broken bones, broke a few fingers, the clavical was broken, part of my back was actually gone, in fact the bone had to be removed.

Q Well, how severely was your left arm injured?

A It was open and I rememer trying to put back, after I was—trying to put back the muscle in my arm, I was under the table and, well, I was bleeding quite a bit from the head and I couldn't see very well and my one finger was almost off and I could tell that my ear was hanging down.

[55] Q Do you know what Mr. McGhar was drinking, do you recall?

A No, I don't.

Q And how much did you have to drink at the apartment with the pizza?

A I think we bought two six packs of beer, we stopped on the way back to the apartment where we ordered the pizza.

Q Was all the beer consumed?

A Yes, I believe so.

Q All right, now you say that when you left the apartment, Mr. McGhar drove?

A Right.

Q Did he have any trouble driving?

A No.

Q He was able to drive your car okay?

A (nodded head affirmatively)

Q I show you what has been marked as People's proposed exhibit number one, the sword and proposed exhibit number One A, the sheath, and ask you to tell the jury whether or not you recognize that?

A Yes, definitely.

Q And what is that?

A That's the weapon that was used.

Q On you?

A Yes.

Q And that was the one that was in the apartment?

A Yes.

[59] Q During the course of this evening from the time that you arrived at the Flame Bar to the time that the ambulance came and got you, were you ever intoxicated?

A Yes, I may have. well, it's hard, yes, I guess so.

Q And what time of the evening was that?

A Probably, well, I know for sure just after we got back and finished our beer and pizza, that would have been around probably 2:30, I guess.

Q And at that point you would describe yourself as intoxicated?

A Well, I said that awfully easily, I mean I was not falling down drunk, but I was. I don't exactly know what you mean by intoxicated, I can't answer your question very well.

Q Now the other people at the apartment helped you drink that beer, is that correct?

A Yes.

Q And how long had you been in their company at the Flame Bar?

A Well, Mr. McGhar and Mr. Katz probably, I guess I said for about an hour, hour and a half.

Q And during that time did you see Mr. McGhar drinking anything?

A Yes, in fact I think I bought him a drink.

Q All right, now you indicated that you left the Flame Bar to go some place and have something to eat, is that correct?

A Yes.

Q Was that your idea?

A No, but I was going along with it.

Q All right, do you recall whose idea it was?

[63] was, started to become worried about his behavior, but I didn't get attacked with the sword until later.

Q All right, and the start of the attack was getting hit in the face, is that correct?

A Right.

Q And you are saying that you were at the apartment approximately an hour before that occurred?

A Right.

Q And do you know what time it was when Mr. McGhar left the apartment and you were discovered?

A Almost exactly, it had to be 7:00 o'clock, 7:01 really, it was pinned down by someone who was leaving that heard the commotion.

Q Isn't it true, Mr. Bennett, that as Mr. McGhar was leaving the apartment you thanked him for not killing you?

A I think I did.

Q You think you did?

A I mumbled something to him as he was sort of unlocking the door and dashing out the door, something like at least you didn't kill me or thank God you didn't kill me, something to that effect.

Q All right, and this was as he was leaving, is that correct?

A Yes.

Q Now you indicated that Mr. McGhar dashed out of the apartment, did you see him, well, the first question, pardon me strike that. How do you get from the apartment to [64] the door leading into Mr. Smith's apartment to the ground level of this apartment building?

A There is a small flight of stairs and steps and there is a little stairwell.

Q So you have to go up a short flight of stairs, is that correct?

A Um hum.

Q Could you see Mr. McGhar as he was going up that flight of stairs?

A Yes, he was carrying some clothes and the sword and certain—

Q All right, was there anything unusual or can you describe how he got up those stairs?

A He was running or you know running, I guess, would be the best way to describe it,

Q And he wasn't hopping?

A Well, he was loping up the steps, I don't know the difference between, he was getting out as fast as he could, and he was getting up the steps, I don't know the difference in the terminology.

Q Now I'd like to take you back to the point, or we will use the line of demarcation if I may in, my question, the time

before you went out in the car and dropped off Mr. Katz and Mr McGhar's friend and the time after that, did you notice any change in Mr. McGhar's behavior before and after that point in time?

A Yes, he became more aggressive.

[67] Q All right, you don't recall?

A (nodded head negatively)

Q When you went into the bedroom, where was Mr. McGhar the last time you saw him before you went into the bedroom?

A In the far corner, standing up in the--by the dresser, or the low dresser.

Q In which room?

A In the bedroom.

Q In the bedroom, so he was also in the bedroom?

A Um hum.

Q And at that time—so he preceded you into the bedroom, is that correct?

A I don't remember.

Q At that time did he have the sword already?

A Yes, he had been carrying it for some time at that point. He was in one corner of the bedroom and I was in the other corner standing in front of the dresser.

Q And what were you doing at the moment when you were first struck, when you were hit in the face with the fist?

A I guess I just, that all happened very quickly, I guess I had just taken off my glasses and set them on the—on the main dresser and I already put some blankets on the bed and had just made the comment as I mentioned before about the bed or the daybed or couch and at that point Mr. McGhar said something about where is my money, and I said, "what money", and laughed and said I had just quit my job, and just got back

[69] Q May I have just—I have just a moment, Your Honor.

THE COURT: (nodded head affirmatively)

MR SHANER:

Q Now are those the only things that you discussed with Mr. McGhar in relation to money?

A I believe I asked him what he was doing at the Flame Bar and re-recounted something about earning some money.

Q Do you remember what in particular?

A Not much detail, no, I don't remember any detail other than I guess he was down there to earn money.

Q I am not sure I understand you, could you explain to me how he was to earn money there?

A Well, I overheard him talking with Mr. Katz, I think he was—he was a matter of prostitution.

Q Now, Mr. Bennett, from the time that you were first hit in the face to the time that Mr. McGhar left the apartment you were conscious, is that correct?

A Yes.

Q You did not lose consciousness?

A No.

Q I have no further questions.

THE COURT: Re-direct—

MR SHANER: of this witness at this time.

RE-DIRECT EXAMINATION BY

MR NOAH:

Q Mr. Bennett, on cross examination you testified that you

[109] approximately 13 years, 12 to 13 years in emergency medicine. In Midland, Michigan and Saginaw, Michigan, and subsequently at the University of Michigan hospital.

Q Now, would you tell the jury and the Court whether or not you were at the Emergency room at the University of Michigan Hospital on May 13, 1974?

A Correct, I was.

Q Would you relate to the jury whether or not you treated the victim of an assault by the name of Robert Bennett?

A I did see such a patient.

Q And would you relate to the jury the wounds that Mr. Bennett at that time was suffering from?

A Initially I in a very brief examination of the patient I noticed that he was having trouble breathing, he was—had a great deal of blood in his mouth, had multiple large cuts over his extremities, both upper extremities, the shoulder,

as well as the back of the head, and was awake and talking. The lacerations were quite large, the left arm was for all practical purposes severed, some of the fingers similarly had been quite severely lacerated.

Q Sgt. Anderson, could you show People's proposed exhibit 3, a slide to the—Dr. Smock and may we have the lights dimmed. Is that the right angle, doctor?

A No, you got it reversed, put that thing in the right hand corner up in the left hand corner, that's correct.

[110] Q Dr. Smock, would you relate to the jury and the Court whether or not you recognize People's proposed exhibit 3?

A I do.

Q And what does that show?

A It shows the left arm.

Q Of Mr. Bennett?

A Correct, at an area which would be in this area here, which would be, well, it's very close to the elbow, it's a disarticulation for all practical purposes, which we mean that the bone is removed very close to the joint and you can see the bone in the left upper portion, the red part that the doctor is holding in the one finger with the rest of the arm below it, since I did not take this picture I do not know what he is holding in the lower portion of the one finger, I am sure that doctor Lewis can instruct you.

Q Is that a fair and accurate representation of how Mr. Bennett's arm appeared to you that day?

A Yes.

Q Sgt. Anderson, would you show Dr. Smock proposed exhibit 5?

A That's upside down. This would be if you were standing at the patient's right shoulder looking at the back of his head, this region here, this would be the right shoulder over on the right side of the photograph and I had great concern when I first saw this patient for several reasons; first of all the airway and then I was concerned as whether we were going to be able to save what appeared to be as his [111] best extremity and that was his right arm, so that we immediately immobilized the entire extremity close to the body because we were looking for some place to start an IV and literally had no place to start one and the best place would have been the right arm but we couldn't use it because of this shoulder, and it's the right shoulder.

THE COURT: I am not oriented—

A Okay, fine, excuse me.

THE COURT: I can't tell which part of the body is which.

A If you can envision yourself, this is the back of the head and he is turned this way, okay. This is this.

THE COURT: I see, all right, thank you, doctor.

A This is this. He is turned away, it's just as it looks.

Q Now is that a fair and accurate representation of the way Mr. Bennett appeared when you saw him?

A Yes, when I saw him he had more hair on the head, he had not been shaved at that point, but for all practical purposes the lacerations were the same, they were untouched except for that.

Q What injuries did he have to the head, doctor?

A I am told subsequently when—we initially saw him, got him stabilized and saved his life from the airway problems and this kind of thing and then sent him right over to xray, we felt, as you can see, the person with the finger here, we felt what we thought was a skull fracture and then subsequently sent him over to xray where I am informed it was confirmed.

[112] Q Now the area of the skull fracture, would you relate to the jury whether or not there are any critical areas where a blow of this magnitude could cause death in a close proximity?

A Well, can I get up again?

Q Yes.

Q Dr., here is a pointer that might assist you?

A At this point here is the whole basis of the rotation for the skull, and this is where a fracture, if you were going to hang someone—

Q Dr., I don't think some of the jury can see this, perhaps you can stand right here.

A Okay, at about this point right here the lacerations as you can see extends down to here, it's separated, this frequently happens with scalp lacerations, you have a large separation, but at this point right here, this is basically the axis of the skull, the whole pivot point for the skull on the neck, and this, as you can see is very much involved in this film, this is as I say, if you were going to hang somebody, this is where the fracture would be, if you were going to try to get a knife through the structure this is where you would go.

Q Sgt. Anderson, could you show Dr. Smock the slide, proposed number exhibit number 6?

A That's better.

Q Is that correct, doctor?

A That's good. This would be the left hand, if you were looking at your own left hand, this is the patient's left [113] hand and it shows the multiple injuries to the left hand, it shows a removal of the left thumb, plus multiple large lacerations.

Q And is that a fair and accurate representation of the way Mr. Bennett's hand appeared that day?

A Yes.

Q You can shut off the slide now, and turn the lights back on. Now, Dr. Smock, the injury to the left arm and from your experience as a physician, is there any probability that Mr. Bennett will ever be able to have much use of that arm?

A No, I would be very surprised if there was anything beyond minimal function of the left arm. The disarticulation the severance of the extremity, even today, there is not much than can be done.

Q Now, Dr. Smock, the cut on the back of the head, if that cut, were say a half inch lower, would it possibly have severed the neck?

A I would say that considering the force involved, with sufficient force to fracture the skull, that he possibly, with a half an inch or if the head had been slightly flexed down just a little more to deflect the blow, that it well might have severed the neck.

MR NOAH: Your Honor, at this time the People move the admission of proposed exhibits 3, 5 and 6 into evidence.

THE COURT: Any objections?

[118] RE-DIRECT EXAMINATION BY

MR NOAH:

Q Dr., without prompt medical treatment, what would be the possibility of Mr. Bennett expiring or dying?

MR SHANER: Object, Your Honor, that is not material to the issues in this case, I don't believe it is relevant to what the issues are, the question of mayhem, whether Mr. Bennett was maimed, disfigured, whether or not there was an assault which does not require any injury whatsoever, I think we are simply going beyond the scope of the material facts at this point.

THE COURT: Mr. Noah?

MR NOAH: I will withdraw that question.

MR NOAH:

Q Did Mr. Bennett suffer a severe loss of blood?

A Very, very large, this patient when I saw him was in shock, we couldn't—no pulse, pressure, we could get a very weak pulse, and was extremely gravely ill at this point and this is where I directed primarily my attention.

MR NOAH: Thank you, I have no further questions.

MR SHANER: Nothing further, Your Honor.

THE COURT: The witness is excused. Thank you for your testimony.

MR NOAH: May counsel approach the bench?

THE COURT: Yes, you can be excused, Doctor?

A Okay.

[128] meet that test with respect to showing that John McGhar did attack Robert Bennett with the intent to murder him

Ladies and gentlemen of the Jury, you are about to go into the jury deliberation room and consider your verdicts. There will be a verdict in each charge as has been indicated to you with respect to count one. You may return a verdict of guilty as charged, guilty of assault with intent to commit murder, which the defense submits to you has not been proved, you may return a verdict of guilty of assault with intent to commit great bodily harm less than murder, which is an offense included within the offense of assault with intent to commit murder. You may also return a verdict of not guilty of this first count.

The second count is mayhem. You may return a verdict of guilty as charged or not guilty.

All the defendant asks is that as you go to the deliberation room and as you deliberate, evaluate my arguments, the Prosecutor's arguments with the evidence that you have heard in this case and consider carefully the instructions as to the law which you are to apply which Judge Campbell will shortly be giving to you.

The defense at this time would contend that if the evidence convinces you that John McGhar had any intent whatsoever that that intent was to do what he did, which was to cause great bodily harm.

In the jury room discuss this case with care.

EXCERPT OF TRIAL COURT INSTRUCTIONS

[132] offered and received into evidence.

Now the admission of evidence in Court is governed by rules of law. From time to time it has been my duty, as Judge, to rule on the admissibility of evidence and you must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit to which an objection was sustained, or any testimony which was ordered stricken.

This is the case of the People of State of Michigan against Johnnie Lee McGhar, also known as Tripper, Washtenaw County Circuit Court Number 74 8639 FY.

There are two counts in the information in this case and you are to consider separately and to return a separate verdict as to each of those two counts.

The statute under which count one is brought reads in substance and material part, as follows: "Michigan Statutes Annotated 28.278. Any person who shall assault another with intent to commit the crime of murder shall be guilty of a felony."

The information filed in the case---strike that—Count one of the information filed in this case, reads in substance and material part as follows: "That on May 13, of 1974, in the Township of Pittsfield, in the County of Washtenaw, Johnnie Lee McGhar with force and arms in and upon Robert Willard Francis Bennett with a certain weapon, to wit: a Semari Sword, feloniously, wickedly and with [133] malice aforethought, did make an assault with intent to kill and murder, contrary to Section 750.83 of the Compiled Laws of 1948, being Michigan Statutes Annotated 28.278, and against the peace and dignity of the People of the State of Michigan.

Now the defendant in this count is charged with the offense commonly termed assault with intent to kill and murder. Any person who shall assault another with intent to commit the crime of murder is guilty of this crime.

The defendant pleads not guilty to this charge.

To establish this charge the People must prove each of the following elements beyond a reasonable doubt. First, that the defendant assaulted Robert Bennett. An assault is defined as an attempt or threat with force and violence to do immediate bodily harm to another by one who has the present means of doing such harm. Second, that at the time of committing such assault the defendant intended to murder the complainant, Robert Bennett.

Murder is the killing of one person by another with malice.

Malice is a term with special meaning in the law. Malice means that the defendant intended to kill, or that he consciously created a very high degree of risk of death with knowledge of the probable consequences of his act and that he did so under circumstances which did not justify, excuse or mitigate the crime.

[134] The crime of assault with intent to murder cannot occur if the assault takes place under circumstances which, had death ensued, would have been reduced to the charge of manslaughter,—strike that—would have reduced the charge to manslaughter.

The crime of murder is reduced to manslaughter if the killing be committed under the influence of passion, or in the heat of blood produced by adequate provocation and before a reasonable time has elapsed for the blood to cool. Manslaughter is distinguished from murder in that with vol-

untary manslaughter, first the mind or reason of the defendant is, at the time of the act, disturbed or clouded by mental or emotional excitement to an extent which might make an ordinary person likely to act rashly or without due deliberation or reflection and from passion rather than judgment.

Second, the cause of such disturbance must be something that would cause ordinary persons to act rashly. The law does not state what things are sufficient to produce such a reaction. Anything, the natural tendency of which would be to produce such a state of mind in ordinary persons is sufficient.

If the defendant suffers from some weakness of mind or infirmity of temper, you may take this into consideration.

Third, the killing must result from such provocation or passion. That is, the killing must have occurred [135] before a reasonable time had elapsed for the blood to cool and reason to resume its control. No precise time can be laid down. The test is whether or not a reasonable time had elapsed under these particular circumstances.

If you find that the crime would have been manslaughter had death resulted, then you may find the defendant not guilty of assault with intent to murder and you may consider whether or not he is guilty of any included—any offense, that is any other offense included within the scope of the information.

When a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist.

Intent is a decision of the mind to knowingly do an act with a fully formed objective of accomplishing a specific result. There can be no crime of assault with intent to mur-

der under our law where there is no intent to murder, and the burden rests upon the Prosecution to show a reasonable doubt—correction—to show beyond a reasonable doubt that the defendant at the time of doing the alleged act had that wrongful intent.

The intent with which a person does an act is known by the way in which he expresses it to others or indicates it by his conduct. The intent with which a person does an act can sometimes be determined from the manner in which it is done. The method used and all [136] other facts and circumstances, but only if established by the evidence.

If you find that the defendant for any reason whatever, did not consciously and knowingly act with the intent to murder, the crime cannot have been committed, and you must find the defendant not guilty of the crime of assault with intent to murder.

If, from all of the evidence, you have a reasonable doubt as to whether or not the defendant knowingly and consciously acted with the intent to murder, then you must find the defendant not guilty of the crime of assault with intent to murder.

There is included within the scope of count one of the information in this case an included offense known as assault with intent to do great bodily harm less than the crime of murder. The elements of this included offense are as follows: any person who assaults another intending to do great bodily harm less than murder is guilty of this crime.

To establish this charge the People must prove each of the following elements beyond a reasonable doubt. First, that the defendant assaulted Robert Bennett.

An assault is an attempt or threat with force and violence to do immediate bodily harm to another by one who has the present means of doing such harm.

Second, that at the time of making such assault the defendant must have intended to cause great bodily harm.

[137] Great bodily harm is defined as serious physical injury which could create a substantial risk of death, or which could cause serious permanent disfigurement or which could seriously and permanently impair the health or function of the body.

Great bodily harm means substantial bodily injury that necessitates immediate medical treatment or causes disfigurement, substantial impairment of health or substantial impairment of any bodily parts.

There are thus three possible verdicts which may be returned with respect to count one in this case: guilty of assault with intent to kill and murder, guilty of assault with intent to do great bodily harm less than murder, and not guilty.

Turning now to count two of the information in this case, I will read you first the statute under which that count is brought, Michigan Statutes Annotated Section 28.629, being Michigan Compiled Laws Annotated 750.397: "any person who with malice,—correction—any person who with malicious intent to maim or disfigure shall cut off—cut out or maim the tongue, put out or destroy an eye, cut or tear off an ear, cut or slit or mutilate the nose or lip, or cut off or disable a limb, organ or member of any other person shall be guilty of a felony".

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The information charges in count two thereof that on May 13th of 1974 at the Township of Pittsfield, in the [138] County of Washtenaw, Johnnie Lee McGhar did commit the crime of mayhem by cutting the left ear, cutting off the left thumb and disabling the left arm of Robert Willard Francis Bennett, contrary to Section 750.397 of the Compiled Laws of 1970 and against the peace and dignity of the People of the State of Michigan.

The elements of this offense are set forth in the statute and information as I have read them to you.

The question of intent is one that is hard to establish directly because grown persons do not always disclose the object they have in view in any acts in which they may indulge and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it, but in connection with all this unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural, probable and legitimate consequences of his acts.

The intent may be inferred from the doing of a wrongful, fraudulent or illegal act, but this inference is not necessarily conclusive. The law presumes that every man intends the legitimate consequences of his own act. Wrongful acts knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent.

[139] Motive is that which recites or stimulates action. Motive is never an essential element of a crime. It is only material from the fact that it tends to show the state of mind when the act was committed. It is never necessary to show a bad motive to convict one of a crime and on the other

hand, the best of motive will not exempt one from criminal responsibility for an illegal act wilfully committed.

The fact that a criminal act is wilfully done with an innocent or laudible motive will not excuse it. When an act is defined by law to be an illegal and criminal, everyone is punishable who does the prohibited act without some legal justification or excuse furnished by the action and the circumstances without regard to his real motive and intention.

Now it is the claim of the People that on May 13, 1974 at Pittsfield Township, in the County of Washtenaw, Johnnie Lee McGhar attacked Robert Bennett with a Semari sword intending to murder him. Such intent is claimed by the People to be proved by the cuts and wounds inflicted upon Mr. Bennett's head, right shoulder and left arm. It is the claim of the People that the cuts and wounds to Mr. Bennett's left hand and arm were caused when Mr. Bennett tried to ward off blows aimed at him with a sword by Mr. McGhar.

It is the further claim of the People that the near severing of Mr. Bennett's left arm and the damage to his left [140] hand have left his left arm and hand useless and that this constitutes mayhem.

Is that a full, complete and correct statement of the claim of the People of the State of Michigan, Mr. Noah?

MR NOAH: Yes, Your Honor.

THE COURT: It is the claim of the defendant that the People have not proven each and everyone of the elements of the two counts against him, or either of them, and more specifically that they have not proven such beyond a reasonable doubt.

Still further, it is the claim of the defendant that the People have failed to prove that the claimed assault made upon Mr. Bennett was made with the intention to kill and murder. Is that a full, fair and complete statement of the claim of the defense?

MR SHANER: Yes, Your Honor.

THE COURT: Thank you, Mr. Shaner.

Now you will recall that at the commencement of this trial the Court instructed the jury as to the presumption of innocence of a defendant. It is the rule of law in criminal cases that the defendant starts in the trial of the case with a presumption of innocence. This presumption continues throughout the course of the trial, until and unless after reaching the jury room, you arrive at the conclusion that the People have proven the defendant [141] is guilty beyond a reasonable doubt. It is your duty to harmonize all of the evidence in the case, if possible, in accordance with this presumption of innocence.

In criminal cases the burden rests upon the People to establish the defendant's guilt of the offense charged beyond a reasonable doubt. This applies to every essential element of the alleged offense. The defendant is not required to prove his innocence and the fact that a person is charged with a crime creates no presumption whatsoever as to his guilt or innocence. The Prosecution is not, however, required to prove the defendant guilty beyond any doubt whatever, but only beyond any reasonable doubt, but if there is a reasonable doubt, then the defendant must be found not guilty.

A reasonable doubt is a fair doubt. A doubt to which you can assign a valid, logical reason. It is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and common sense. It is such a doubt as may leave your minds, after a careful examination of all of the evidence in the case in that condition that you cannot say that you have an abiding conviction to a moral certainty of the truth of the charge here made against the defendant.

To find the defendant guilty you must be able to say there is no rational theory on which credible evidence may be reconciled but that of the defendant's

FILED—JAN 21 1986—JOHN P. HEHMAN, Clerk

NO. 85-1177

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHNNIE LEE MCGHAR, Petitioner-Appellee vs. THEODORE KOEHLER AND FRANK KELLEY, Respondents-Appellants	ORDER

Upon consideration of the motion of the appellant for additional stay of the mandate pending application for Writ of Certiorari,

It is ORDERED that the motion be, and it hereby is, granted.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
John P. Hehman /s/

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
FEB 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1309

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THEODORE KOEHLER,

Petitioner,

v

JOHNNIE LEE McGHAR,

Respondent.

MOTION OF RESPONDENT JOHNNIE LEE McGHAR FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Submitted by:

WILLIAM J. CHAMPION III
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444 Michigan Avenue
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(313) 223-8033

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Respondent.

MOTION OF RESPONDENT JOHNNIE LEE McGHAR FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Johnnie Lee McGhar, by his attorney, William J. Champion III, moves pursuant to Supreme Court Rule 46 for leave to proceed in forma pauperis.

In support thereof, Respondent states as follows:

1. Respondent sought and was granted leave to proceed in forma pauperis in the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit, the courts below.

2. The undersigned counsel, a member of the bar of this Court, was appointed by the United States Court of Appeals for the Sixth Circuit to represent the interests of Respondent under the provisions of the Criminal Justice Act of 1964, as amended.

Respectfully submitted,

WILLIAM J. CHAMPION III *
Attorney for Respondent
444 Michigan Avenue, Room 1670
Detroit, Michigan 48226
(313) 223-8033

*Counsel of Record

No. 85-1309

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THEODORE KOEHLER,

Petitioner,

v

JOHNNIE LEE McGHAR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Submitted by:

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QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT A REASONABLE JUROR MAY HAVE APPLIED UNCONSTITUTIONAL BURDEN-SHIFTING INSTRUCTIONS GIVEN AT RESPONDENT'S STATE COURT TRIAL TO BOTH COUNTS OF A TWO-COUNT INDICTMENT ARISING OUT OF THE SAME UNDERLYING ACTS, AND THAT THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

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No. 85-1309

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THEODORE KOEHLER,

Petitioner,

v

JOHNNIE LEE McGHAR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

I.

Procedural History

On April 22, 1975, Respondent, Johnnie Lee McGhar, a/k/a "Tripper" was convicted of assault with intent to murder and mayhem in violation of Mich. Comp. Laws §750.83, (Mich. Stat. Ann. §28.278) and Mich. Comp. Laws §750.397, (Mich. Stat. Ann. §28.629), respectively, after a trial by jury in the Washtenaw County, Michigan Circuit Court. He was sentenced to life imprisonment on the charge of assault with intent to murder. On the charge of mayhem, McGhar received a sentence of six and one-half (6 1/2) to ten (10) years imprisonment.

McGhar's convictions were affirmed by the Michigan Court of Appeals. People v McGhar, No. 25003 (Mich. App.

Jan. 18, 1972)(per curiam). The Michigan Supreme Court denied leave to appeal. People v McGhar, No. 59737 (Mich. Sep. 1, 1977).

On March 27, 1980, McGhar filed an Application for Delayed Appeal to the Michigan Court of Appeals. Leave to appeal was denied in an unpublished order for "lack of merit in the grounds presented." People v McGhar, No. 50851 (Mich. App. Oct. 22, 1980). McGhar's application for leave to appeal to the Michigan Supreme Court was also denied. People v McGhar, 411 Mich. 989 (1981).

After exhausting his state remedies, McGhar filed an Application for Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan, 28 U.S.C. §2254. By Memorandum Opinion and Order dated August 10, 1982, the district court denied McGhar's petition on procedural grounds. McGhar v Koehler, No. 81-73659 (E.D. Mich. Aug. 10, 1982).

McGhar appealed the district court's order to the United States Court of Appeals for the Sixth Circuit. In an unpublished per curiam opinion, the court of appeals reversed the decision of the district court and remanded the cause for consideration on the merits. McGhar v Koehler, No. 82-16128 (6th Cir. Mar. 5, 1984).

On remand, McGhar filed a motion for partial summary judgment, seeking habeas relief. On September 21, 1984, the district court issued a Memorandum Opinion and Order granting McGhar's motion for partial summary judgment. McGhar v Koehler, No. 81-73659 (E.D. Mich. Sept. 11, 1984).

On December 11, 1984, the district court entered an Order Conditionally Granting Petition for Writ of Habeas Corpus and a Judgment, in accordance with its memorandum opinion and order of September 21, 1984. McGhar v Koehler, No. 81-73659

(E.D. Mich. Aug. 10, 1982).

McGhar appealed the district court's order to the United States Court of Appeals for the Sixth Circuit. In an unpublished per curiam opinion, the court of appeals reversed the decision of the district court and remanded the cause for consideration on the merits. McGhar v Koehler, No. 82-16128 (6th Cir. Mar. 5, 1984).

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On December 11, 1984, the district court entered an Order Conditionally Granting Petition for Writ of Habeas Corpus and a Judgment, in accordance with its memorandum opinion and order of September 21, 1984. McGhar v Koehler, No. 81-73659 (E.D. Mich. Dec. 11, 1984). On December 21, 1984, the district court entered an order, pursuant to F.R.Civ.P. 54(b) directing the entry of final judgment in accordance with the judgment and order of December 11, 1984.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed. McGhar v Koehler, No. 85-1177 (6th Cir. Nov. 8, 1985).

On January 31, 1986, Petitioner filed a Petition for Writ of Certiorari to the United States Court of Appeals of the Sixth Circuit, seeking review of the November 8, 1985 decision of the court of appeals.

Statement Of Facts

The facts underlying McGhar's convictions were cogently summarized by the Court of Appeals in its per curiam opinion of March 5, 1984.

> The facts of this case present a rather bizarre incident. On May 12, 1974, Robert Bennet entered the Flame Bar in Ann Arbor, Michigan. Inside the bar he recognized a friend, Larry Katz, who was seated with McGhar and joined them. They remained in the bar until about 1:30 a.m. when the group, now joined by a friend of McGhar's, parted for Bennet's apartment. After pizza and two six-packs of beer the party seemed to get a little out of hand. First, McGhar's friend was removed because it was suspected that he had taken something from Bennet's bedroom. McGhar then removed from the wall a Samurai sword and threatened Katz. Despite this behavior, Bennet apparently agreed to let him [McGhar] stay with him because McGhar had no place to go. Around 4:30 - 5:00 a.m. Katz was ready to give up the ghost and asked Bennet to drive him home. McGhar joined them for the ride. About 45 minutes later, after returning to the apartment and following an animated conversation, McGhar struck Bennet in the mouth with his fist, breaking several teeth. McGhar then pulled the Samari sword from the wall and began slashing Bennet. This continued for some 45 minutes until McGhar went hopping up the steps leaving Bennet bleeding from a large number of fairly serious wounds.

McGhar v Koehler, No. 82-16128, op. at 2 (6th Cir. Mar. 5, 1984).

Robert Bennet testified at trial that he joined McGhar, whom he knew as "Tripper", at the Flame Bar in Ann Arbor (Tr. 48-49).[1] Bennet sat at McGhar's table and drank alcohol for approximately one to one and one-half (1 to 1 1/2) hours (Tr. 48). During this time, Bennet had five whiskeys (Tr. 54). Bennet described himself as intoxicated (Tr. 59), and recalled that McGhar was drinking as well (Tr. 59).

After leaving the bar, the group purchased a pizza and two six packs of beer. They then went to an apartment where Bennet was staying (Tr. 55). At some point during the evening, Bennet "started to become worried about [McGhar's] behavior." (Tr. 62-63). Bennet testified that McGhar picked up a Samurai sword and "was sort of flailing away at Mr. Katz'

---

1. The symbol "Tr." refers to the transcript of proceedings held in People v Johnnie Lee McGhar, Washtenaw County Circuit Court No. 74-8639 (April 21-22, 1975).

feet." (Tr. 51). Later in the evening, after Mr. Katz had left the apartment, Bennet noted a marked change in McGhar's behavior which led him to believe that McGhar had taken some drugs (Tr. 65). McGhar "started to act what I thought in a sort of aggressive, bizarre way, fooling around in the kitchen, and he was making something and tried to put some of it in my face." (Tr. 51). Bennet saw McGhar using kitchen utensils in an unusual fashion, attempting to make a "pancake" out of dough and water (Tr. 65-66). He felt "something definitely seemed to be wrong with [McGhar] after awhile and I just didn't know what it was. We hadn't--hadn't been arguing or didn't seem to be any reason for him to be angry." (Tr. 65).

McGhar became involved in an animated conversation with Bennet in the apartment's bedroom, which culminated in the attack on Mr. Bennet (Tr. 67-69).

McGhar did not testify at his trial, nor were any witnesses called on his behalf. In his opening statement, McGhar's court-appointed counsel conceded that McGhar had committed the act which caused the serious injuries to Mr. Bennet (Tr. 45). The defense steadfastly maintained, however, that McGhar lacked the specific intent required to commit the crimes charged.

In his opening statement, defense counsel stated "... the defendant is not guilty of the charge of assault with intent to commit murder. The crux of this crime is the intent. It is that element which will be the central focus, I submit to you, of this case." (Tr. 45-46). The defense theory was that

> [T]he incident which led to these injuries came after a night of drinking on top of a dose of halluciginic [sic] drugs. The evidence will show, as grim as it may sound, had the defendant wanted to kill Robert Bennett he had ample opportunity to do so."

(Tr. 46).

The "central issue", if not the only issue, at McGhar's trial was his intent on the morning of March 13, 1974 (Tr. 47).

In his closing argument, defendant's counsel reiterated the defense theory.

> [T]he question before you is one of intent. Did John McGhar assault Robert Bennett with the intent to murder him.
>
> The defense submits that the evidence offered to you in this case does not establish that intent on the part of John McGhar beyond a reasonable doubt.
>
> * * *
>
> Mr. McGhar as the result of intoxication and drugs was beserk, with no state of mind, with no intent.

(Tr. 125, 126)

Without conceding any mens rea, defense counsel argued, in the alternative, that if "McGhar had any intent whatsoever that that intent was to do what he did, which was to cause great bodily harm." (Tr. 128).

Against this factual backdrop, the trial court charged the jury, in relevant part, as follows:

> The question of intent is one that it is hard to establish directly because grown persons do not always disclose the object they have in view in any acts in which they may indulge and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it, but in connection with all of this unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural, probable and legitimate consequences of his acts.
>
> The intent may be inferred from the doing of a wrongful or illegal act, but this inference is not necessarily conclusive. The law presumes that every man intends the legitimate consequences of his own act. Wrongful acts knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent.
>
> * * *
>
> The fact that a criminal act is willfully done with an innocent or laudable motive will not excuse it. When an act is defined by law to be an illegal

> and criminal [sic] everyone is punishable who does the prohibited act without some legal justification or excuse furnished by the action and the circumstances without regard to his real motive and intention.

(Tr. 138-139) (emphasis added).

After giving these instructions, the trial court instructed the jury on the theories of the parties, the presumption of innocence and the state's burden of proof (Tr. 138-141).

The jury returned verdicts of guilty as charged on both counts.

ARGUMENT

I.

The Courts Below Correctly Ruled That The Jury Instructions Given At McGhar's State Court Trial Violated His Rights Under The Fourteenth Amendment To The United States Constitution.

In Sandstrom v Montana, 442 U.S. 510, 512 (1979), the court declared unconstitutional a jury instruction that "the law presumes that a man intends the ordinary consequences of his voluntary acts." The court held that reasonable jurors could have given the presumption either conclusive or burden-shifting effect, thus unconstitutionally relieving the prosecution of its burden of proof on an essential element of the crime charged. In re Winship, 397 U.S. 358 (1970).

The trial court's charge in the instant case was virtually identical to that condemned by the Court in Sandstrom. The trial judge charged the jury that "the law presumes that every man intends the legitimate consequences of his own acts." (Tr. 138).

The trial court then compounded its instructional error when it charged the jury that:

> [U]nless the testimony satisfies you of something else, you are warranted in holding a party responsible

> for the natural, probable and legitimate consequences of his acts.

(Tr. 138) (emphasis added).

In a well-reasoned opinion, the Michigan Supreme Court held that a virtually identical instruction unconstitutionally shifted the burden of proof on the issue of intent.

> We are convinced that by instructing the jury that "unless the testimony satisfies you of something else", the trial court created the prospect that the jury "may have interpreted the judge's instructions as ... a burden-shifting presumption", Sandstrom, supra, p. 524, and the instruction is therefore unconstitutional.

People v Wright, 408 Mich. 1 (1980).

The trial court's instructional error was further compounded when it charged the jury that "intent may be inferred from the doing of a wrongful, fraudulent or illegal act, but this inference is not necessarily conclusive (Tr. 138) (emphasis added). As the Michigan Supreme Court held in Wright:

> Besides injecting the unexplained notion that the instruction describes an inference (which can never be conclusive), the language suggests that there are cases where the presumption is conclusive. Moreover, the jury was not told whether this case was "necessarily" one of them.

Id., at 20.

Further compounding its error, the trial court charged the jury that "wrongful acts knowingly or intentionally committed can neither be justified or excused on the grounds of innocent intent." (Tr. 138) (emphasis added). Upon listening to this instruction, a conscientious juror may very well have believed that if McGhar committed a "wrongful act", his intent was simply irrelevant. An identical instruction was held to be unconstitutional by the Michigan Supreme Court in People v Wright, 408 Mich. 1 (1980).

Lastly, the court instructed the jury that:

> When an act is defined by law to be an illegal and criminal [sic], everyone is punishable who does the prohibited act without some legal justification

> or excuse furnished by the action and the circumstances without regard to his real motive and intention.

(Tr. 139) (emphasis added).

As the district court noted, this instruction "arguably removed the issue of intent from the jury's consideration." McGhar v Koehler, No. 81-73659, mem. op., at 14 (E.D. Mich. Aug. 10, 1983). In no uncertain terms, the trial court instructed the jury that McGhar's "real intention" was simply not an issue. As such, the instruction totally relieved the prosecution of its burden of proof on an essential element of both crimes charged, and was the functional equivalent of a directed verdict on the issue of intent. Accord, Connecticut v Johnson, 460 U.S. 73, 84 (1983). No matter how overwhelming the evidence, a trial court is not free to direct a verdict in favor of the state on an essential element of crime. United States v Martin Linen Supply Company, 430 U.S. 564 (1977).

Whether any individual instruction, viewed in isolation, sufficiently tainted the proceedings to warrant habeas relief, the court of appeals correctly held that the cumulative effect of the instructions was to relieve the prosecution of its burden of proof on the only disputed issue at trial, John McGhar's intent.

Petitioner's contention that the unconstitutional instructions tainted only the mayhem charge and not the assault with intent to murder charge is disingenuous at best. Petitioner apparently feels that since the unconstitutional instructions on intent followed the trial judge's instructions defining mayhem, the jury would not follow these instructions with respect to the assault charge. A review of the internal structure of the trial court's charge demonstrates that the intent instructions were intended to apply to both counts of the indictment.

After his introductory comments, the trial court instructed the jury on the elements of assault with intent to commit murder, including the specific intent required to support a conviction on the charge (Tr. 133-137). The court then instructed the jury on the elements of mayhem (Tr. 137-138). Following these instructions, the court gave the lengthy and erroneous instructions on the only disputed issue in the trial, an issue common to both counts: the defendant's specific intent (Tr. 138-139).[2/]

Nowhere in the court's charge is there any indication that the burden-shifting instructions on intent were applicable only to one count or another. In fact, immediately following the burden-shifting instructions, the court instructed the jury on the state's theory with respect to the assault charge (Tr. 139-140).

In defining the charge of assault with intent to murder, the trial court instructed the jury on the degree of intent required to support a conviction (Tr. 135). In the challenged instructions, the trial court instructed the jury on the manner in which such intent could be deemed proven. As such, "the jury could easily, and may well have applied the explanatory instructions to both counts." McGhar v Koehler, No. 81-73659, mem. op., at 8, n. 2 (E.D. Mich., Sept. 21, 1984).

Even assuming, arguendo, that the trial court intended the erroneous instructions to be applicable only to the mayhem charge, the trial court's intent was not adequately communicated to the jury. It would be illogical to assume that the jury utilized the burden-shifting instructions on intent to arrive

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2. In the district court, petitioner contended that "intent was not an issue regarding mayhem." (Brief in Opposition to Motion for Partial Summary Judgment, p. 19). If true, there would seem to be little reason to give detailed instructions on intent with respect to that charge. Petitioner has apparently abandoned this position.

at a verdict on one count, but ignored the instructions in arriving at a verdict on the other. As noted by the Court of Appeals, both charges arose out of the same underlying acts. McGhar v Koehler, No. 85-1177, op., at 2 (6th Cir. Sep. 11, 1984).

It must be presumed that jurors conscientiously follow the instructions given them. Frazier v Cupp, 394 U.S. 731, 735 (1969). It cannot be presumed, however, that jurors are able to divine what petitioner claims to be the secret intent of a trial judge in giving the instructions.

The courts below reached a conclusion not unlike that reached by the Court in Francis v Franklin, 471 U.S. ____, 105 S.Ct. 1965, 85 L.Ed. 2d 344, 358, n. 7 (1985).

> [I]t is certainly reasonable to expect a juror to attempt to make sense of a confusing earlier portion of the instruction by reference to a latter portion of the instruction.

The trial court's generally correct instructions on the state's burden of proof and the presumption of innocence did not cure the constitutional defect in its erroneous instructions. Francis v Franklin, 471 U.S. ____, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985).

Accordingly, the court of appeals correctly held that the jury instructions violated petitioner's rights under the fourteenth amendment to the United States Constitution.

II.

Petitioner Failed To Demonstrate That The Unconstitutional Jury Instructions Were Harmless Beyond a Reasonable Doubt.

In Sandstrom v Montana, 442 U.S. 510 (1979), the Court did not reach the issue of whether burden-shifting jury instructions can ever be considered harmless beyond a reasonable doubt. Upon remand, the Montana Supreme Court vacated Sandstrom's conviction stating:

> In considering the instructions, and the fact that intent was the main issue in the district court trial, we cannot make that assertion [that the error was harmless]. The erroneous instruction goes to a vital element of the proof of the crime, namely the intent of the defendant Sandstrom in committing the homicide.

State v Sandstrom, 184 Mont. 391 (1979).

In Connecticut v Johnson, 460 U.S. 73 (1983), an equally divided court failed to provide definitive guidance as to whether a Sandstrom violation can ever be considered harmless. See also, Francis v Franklin, 471 U.S. ____, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985); Engle v Koehler, 707 F.2d 241 (6th Cir. 1983), aff'd by an equally divided court sub nom Koehler v Engle, 464 U.S. ____, 104 S.Ct. 1673, 80 L.Ed. 2d 1 (1984); Davis v Kemp, ____ U.S. ____, 105 S.Ct. 2690; 86 L.Ed. 2d 707 (1985). A four-justice plurality of the court, with Justice Stevens concurring on the result, held that a violation of Sandstrom could never be harmless error except in exceptional circumstances, such as where intent was not a contested issue at trial. The plurality believed that a Sandstrom violation involved "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Connecticut v Johnson, 460 U.S. 73, 81 (1983), quoting, Chapman v California, 386 U.S. 18, 23 (1967).

While respondent strongly advocates the position of the plurality, it is not necessary to decide the issue left unresolved in Connecticut v Johnson in this case. Both the district court and the court of appeals "conducted a careful, harmless error inquiry and concluded the Sandstrom error at trial could not be deemed harmless." Francis v Franklin, 471 U.S. _____, 105 S.Ct. 1965, 85 L. Ed. 2d 344, 360 (1985). Questions regarding harmless error are more appropriately left to the courts below. Connecticut v Johnson, 460 U. S. 73, 102 (1983) (Powell, J, dissenting).

> The primary task of this Court upon review of a harmless error determination by the court of appeals is to insure that the court undertook a thorough inquiry and made clear the basis of its decision.

Francis v Franklin, 471 U.S. _____, 105 S.Ct. 1965, 85 L. Ed. 2d 344, 360, n. 10 (1985).

In its thorough and well-reasoned opinion, the district court held that "it is difficult, if not impossible, to conclude that the instructions given the jury in the present did not contribute to plaintiff's convictions, and therefore, are not harmless error." McGhar v Koehler, No. 81-73659, mem. op., at 14 (E.D. Mich. Sept. 21, 1984). The court of appeals agreed. McGhar v Koehler, No. 85-1177 (6th Cir. Nov. 8, 1985).

Where, as here, the sole defense is lack of mens rea, "a Sandstrom instruction can be extremely prejudicial even if over all proof of intent or malice is substantial." Engle v Koehler, 707 F.2d 241, 246 (6th Cir. 1983), aff'd by an equally divided court sub nom Koehler v Engle, 464 U.S. ____ 104 S.Ct. 1673, 80 L.Ed. 2d 1 (1984) (per curiam).

The facts in Engle are remarkably similar to those in the instant case. In Engle, the defendant admitted committing the homicide charged, but denied having the requisite mens rea to sustain a murder conviction because of the combined effects of alcohol and drug use. Under those circumstances, the court held that the burden-shifting presumption created by a Sandstrom instruction could not be considered harmless. Engle v Koehler, 707 F.2d at 248; accord, In re Hamilton, 721 F.2d 1189, 1191 (9th Cir. 1983).

While the evidence of McGhar's participation in the acts underlying the charge was substantial, and, in fact, his participation was conceded by counsel, the evidence with respect to his intent was far from overwhelming. The very bizarre and gruesome nature of the acts could create doubt as to McGhar's intent. There was evidence at trial that McGhar

had consumed substantial amounts of alcohol (Tr. 48, 54, 55, 59). The victim testified that McGhar began acting in "a bizarre way" (Tr. 51); that "something definitely seemed wrong with him after awhile (Tr. 65); that he was not acting in a normal fashion (Tr. 65-66); and that he might have been on drugs (Tr. 65). There was sufficient evidence, and Petitioner does not appear to contend otherwise, that a rational juror could have found McGhar lacked the specific intent the crimes alleged because of his consumption of alcohol and mind altering drugs.

Even if the state's circumstantial evidence on intent was strong, this Court cannot conclude that the jury was unaffected by the erroneous instructions. As the plurality noted in Connecticut v Johnson, 460 U.S. 73, 85-86 (1983)

> An erroneous presumption on a disputed element of a crime renders irrelevant the evidence of the issue because the jury may have relied upon the presumption rather than the evidence. If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming, it is then simply irrelevant.

When confronted with instructions which would permit a conviction by simply relying upon a conclusive or burden-shifting presumption on intent, once having found the conceded fact that McGhar committed the act, it is difficult to believe that the jury would have undertaken the more difficult task of evaluating conflicting evidence at arriving at a verdict independent of the unconstitutional presumption.

The fact that the trial court correctly instructed the jury on the presumption of innocence and in the state's obligation to prove each element of the crimes charged beyond a reasonable doubt, does not cure the constitutional error committed. In Engle v Koehler, 707 F.2d 241, 245 (6th Cir. 1983), the court held that:

> The instructions on the presumption of innocence and on proof beyond a reasonable doubt are not rhetorically inconsistent with the existence of a burden-shifting presumption because a reasonable juror could have regarded the presumptions on malice and intent as "a means by which proof beyond a reasonable doubt ... [omitted in original] could be satisifed.

In conducting a careful harmless error inquiry, the court of appeals correctly concluded that "because defendant's intent was a central issue in each charge, the error was not harmless beyond a reasonable doubt." McGhar v Koehler, No. 85-1177 op., at 2 (6th Cir. Nov. 8, 1985).

CONCLUSION AND RELIEF REQUESTED

Petitioner has failed to set forth any grounds for invoking the Court's discretion to review the judgment of the court of appeals on writ of certiorari. The decisions of the district court and court of appeals are in accord with decisions of other courts and this Court.

WHEREFORE, Respondent, Johnnie Lee McGhar, prays that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, or in the alternative, upon granting the Writ, affirm the decision of the Court of Appeals.

Respectfully submitted,

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